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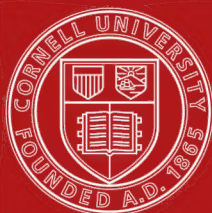
A. M. BOARDMAN and ELLEN D. WILLIAMS

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A treatise on the interpretation of will



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A TREATISE
ON THE
INTERPRETATION OF WILLS

SHOWING THE

POINTS OF RESEMBLANCE AND CONTRAST BETWEEN
THE AMERICAN AND ENGLISH

RULES OF TESTAMENTARY CONSTRUCTION,

WITH

REFERENCES TO ALL THE LEADING AUTHORITIES
IN POINT,

BY JOHN P. O'HARA,
COUNSELLOR AT LAW.



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PREFACE TO PART II.

It has been doubted by Sir Edward Coke¹ and others whether the latitude of interpretation allowable in the case of wills has at all operated favorably to the material interests of the community. However, when once a testament came to be regarded as of a different nature from a deed, it was inconsistent to halt in the career of liberality and refuse to any term in a will a common-place meaning. A marriage settlement is often copied from a preceding settlement, and a will in like manner is sometimes copied from a preceding will or partly from a deed. To give to the phrase "heirs of the body" in a will, therefore, a stricter signification than if the term used were "issue," "sons," or "children" frequently defeats a testator's intention. The technical phrase, in fact, when misapplied, indicates gross ignorance rather than a knowledge of law on the part of the testator.

Every regard to technicality, as such, in a will is a negation of its primary nature, viz., as an instrument made by a person *in articulo mortis, inops consilii*, and without the necessary time to prepare a technical document. Many persons are as unwilling to make their wills as to insure their lives. They do not wish to give any of their friends an interest in their timely decease. This disposition is natural and wholesome. A forced registration or open publication of wills is, therefore, out of the question. But, to construe a will by the light of technical rules is virtually to disregard a testator's desire of secrecy; inasmuch as the frequent consultation of a professional adviser is apt to lead to a discovery both of the fact that a will is in contemplation, and also of the provisions it is likely to contain. It is thus necessary, for the peace of

¹ 2 Bulst. 130.

families that wills should always be construed at least as liberally as hitherto. So far as precedents apply, they ought, no doubt, to be followed, especially if they are not isolated, but continuous for many years and pronounced or approved of by judges of eminence. Yet so far as the American law of wills is still unsettled—*adhuc sub Judice*—a liberal interpretation seems to be much more expedient than an adhesion to technicality.

Our courts have hitherto construed wills in a less technical spirit than the English cases warranted. Besides the leading points of contrast between English¹ and American law mentioned in the introduction to Part I the reader will find in the index to this treatise, under the title "American law," all the points in respect to which the testamentary codes of the two nations differ. It will be apparent from this survey that our courts have still a wide margin for discretion upon many questions.

Although this treatise professes to comprise only rules of construction, yet, the reader may find a sufficient sketch of the law relating to the execution and revocation of wills in general, to enable him to dispense with further light on these points, except so far as the special requirements of State statutes render necessary.

In order to define with exactness the scope and bounds of rules of construction, occasional reference has been made in this work to rules of law and rules of administration. Of the nature of rules of law enough has been said in the Introduction to Part I.

Rules of administration relate to the variable incidents of property. Some of the elements of estates in land and of other legal interests are invariable. Such are the incidents of alienation by tenant in fee, liability to debts, &c. But, other elements of property may be moulded by any testator as he pleases. All rules of construction, for instance, as described in the introduction, are at his mercy. So are all rules of administration. They are only so far like rules of law that they are incidents of property and not inferences of construction. But, they also so far resemble rules of construction that they are variable at the

¹ Page 12.

choice of each testator. He can make his realty, or a particular part thereof, or of his personalty, to be the primary fund for payment of his debts, though he cannot wholly defeat by will the claims of his creditors. For a liability to debts is an incident of property that springs from a rule of law, and is not variable like a rule of construction or of administration. So with respect to the other immutable incidents of estates and property. These are few. But they are unalterable, and are, so to speak, the constitution round which legal construction gyrates, but which it cannot control. They are the same in wills as in deeds, although certain rules of construction for deeds are also rules of law. But, in wills all rules of construction, or of administration, under which are comprised the doctrines of exoneration and marshalling, are subject to the testator's directions. Rules of law or of public policy are the only doctrines which he cannot successfully invade. They can only be altered or deprived of their universal force by a statute.

Besides the whole law of testamentary conveyancing, the nature of charges on land, the charging powers of tenants in tail, and the incidents of powers in general, both under the statute of uses and in equity, are treated of in the following pages, so that the work, besides compassing its own proper ground, enters largely upon conveyancing by deed. This perhaps was not strictly necessary for the elucidation of testamentary rules, yet, few will consider that the lateral support which many doctrines of testamentary construction find in rules of construction generally can be too extensively surveyed.

Much difficulty is likely to be experienced in future in America, in construing statutes that alter some old rule of the common law. The author, therefore, bestowed more attention upon the case of *Mellish v. Vallins*¹ than its importance at the present day seemed to require. He has also with a similar view dwelt upon the question whether remainders can be too remote, as this enquiry is, in the present turning point of the old rule, apt to give rise to some further argument not only here but also in England. The law relating to precatory trusts, the meaning of the word "survivor," and the other points referred to in the index under the title "American Law," is also

¹ 2 Jo. & H. 194; *infra*, 236.

perhaps in a state of transition. Upon these and similar doubtful points the author has endeavoured to discuss the rules in question with somewhat of detail. Much more room, it is obvious, is open to litigation under wills here than in England, where the whole ground is nearly covered by authority. There is reason, however, to hope that our courts will adopt the principles acted hitherto by them with respect to the rule in Shelley's case, and will discard all mere rules of conveyancing, except as helps to understanding the particular wishes of the testator.

The statements in this work are very condensed; else, indeed, it would have been impossible to comprise such a quantity of legal matter in so small a compass. If any passage appears obscure, it is to be hoped that the difficulty is owing to this source, and that a patient examination will repay the practitioner for the labor of his research.

TABLE OF CONTENTS.

CHAPTER I.

NATURE AND INCIDENTS OF WILLS.

| | |
|---|----|
| § 1. Relations of American to English Testamentary Law..... | 1 |
| § 2. A will defined and explained..... | 4 |
| § 3. Revocation..... | 6 |
| § 4. Conflict of Testamentary Laws. What law prevails..... | 8 |
| § 5. Domicile..... | 10 |
| § 6. Capacity to will..... | 12 |
| § 7. Period by reference to which a will is construed..... | 16 |
| § 8. Interests disposable by will..... | 19 |

CHAPTER II.

GENERAL PRINCIPLES OF TESTAMENTARY CONSTRUCTION.

| | |
|---|----|
| § 1. Principles of American adjudication..... | 22 |
| § 2. Precedents..... | 23 |
| § 3. Rules of law..... | 24 |
| § 4. Rules of construction..... | 24 |
| § 5. Intention..... | 29 |
| § 6. Distinct gifts..... | 33 |
| § 7. Equitable interpretation..... | 34 |
| § 8. Repugnancy..... | 35 |
| § 9. Transposition of words..... | 37 |
| § 10. Alteration of words..... | 38 |
| § 11. Rejecting words..... | 39 |
| § 12. Supplying words..... | 40 |
| § 13. Misdescription—False Demonstration..... | 42 |
| § 14. Uncertainty of subject of gift..... | 43 |
| § 15. Uncertainty of object of gift..... | 45 |
| § 16. General observations..... | 52 |

CHAPTER III.

FRAUD, ACCIDENT AND MISTAKE.

| | |
|--------------------------------|----|
| § 1. Fraud..... | 54 |
| § 2. Accident and Mistake..... | 56 |

CHAPTER IV.

MEANING OF CERTAIN WORDS AND PHRASES.

| | |
|--|----|
| § 1. Terms of devise. Real terms..... | 59 |
| § 2. Terms of bequest. Personal terms..... | 67 |

CHAPTER V.

DEVISES OF REALTY.

| | |
|-------------------------|----|
| Devisees of realty..... | 75 |
|-------------------------|----|

CHAPTER VI.

RULE IN SHELLEY'S CASE.

| | |
|------------------------------|----|
| Rule in Shelley's case | 92 |
|------------------------------|----|

CHAPTER VII.

ESTATES TAIL.

| | |
|--|-----|
| § 1. Their nature and incidents..... | 108 |
| § 2. No merger of estates tail | 113 |
| § 3. American modifications of the law of entails..... | 116 |

CHAPTER VIII.

DYING WITHOUT ISSUE.

| | |
|--------------------------|-----|
| Dying without issue..... | 118 |
|--------------------------|-----|

CHAPTER IX.

JOINT TENANCY.

| | |
|--------------------|-----|
| Joint tenancy..... | 131 |
|--------------------|-----|

CHAPTER X.

FUTURE ESTATES.

| | |
|------------------------------|-----|
| § 1. Remainder | 138 |
| § 2. Executory devises | 141 |
| § 3. Cross-remainders | 144 |

CHAPTER XI.

SETTLEMENTS OF PERSONALTY.

| | |
|----------------------------------|-----|
| Settlements of personality | 151 |
|----------------------------------|-----|

CHAPTER XII.

EQUITABLE CONVERSION.

| | |
|------------------|-----|
| Its nature | 155 |
|------------------|-----|

CHAPTER XIII.

RESULTING TRUSTS.

| | |
|------------------------|-----|
| Resulting trusts | 160 |
|------------------------|-----|

CHAPTER XIV.

IMPLIED GIFTS.

| | |
|---------------------|-----|
| Implied gifts | 167 |
|---------------------|-----|

CHAPTER XV.

LIMITATIONS TO TRUSTEES.

| | |
|-------------------------------|-----|
| Limitations to trustees | 173 |
|-------------------------------|-----|

CHAPTER XVI.

SURVIVORSHIP.

| | |
|---|-----|
| § 1. Rule in <i>Ferguson v. Dunbar</i> | 189 |
| § 2. Survivorship. Accrued interests | 195 |
| § 3. Period for ascertaining survivorship | 197 |
| § 4. Gifts contingent upon decease | 204 |

CHAPTER XVII.

POWERS.

| | |
|--|-----|
| § 1. Nature and incidents of powers..... | 206 |
| § 2. Precatory trusts | 211 |
| § 3. Terms of request..... | 221 |
| § 4. Definiteness of subject..... | 223 |
| § 5. Definiteness of object..... | 225 |

CHAPTER XVIII.

INCUMBRANCES.

| | |
|-----------------------|-----|
| § 1. Mortgages..... | 231 |
| § 2. Charges..... | 237 |
| § 3. A sole fund..... | 243 |
| § 4. Dower..... | 244 |

CHAPTER XIX.

ELECTION.

| | |
|---------------|-----|
| Election..... | 249 |
|---------------|-----|

CHAPTER XX.

VESTING.

| | |
|---|-----|
| § 1. Interests in land.... | 254 |
| § 2. Future vested gifts of land..... | 257 |
| § 3. Vesting of legacies charged on land..... | 259 |
| § 4. Vesting personal legacies..... | 261 |

CHAPTER XXI.

CONDITIONS.

| | |
|---|-----|
| § 1. Their nature and incidents..... | 266 |
| § 2. Classification of conditions..... | 270 |
| § 3. Conditions in restraint of alienation..... | 274 |
| § 4. Other void conditions..... | 278 |
| § 5. Conditions in restraint of marriage..... | 280 |
| § 6. Equitable relief..... | 285 |

CHAPTER XXII.

TRUSTS FOR SEPARATE USE.

| | |
|------------------------------|-----|
| Trusts for separate use..... | 286 |
|------------------------------|-----|

CHAPTER XXIII.

GIFTS TO CERTAIN PERSONS AND CLASSES.

| | |
|----------------------------------|-----|
| § 1. Gifts to a class..... | 288 |
| § 2. Heirs..... | 297 |
| § 3. Executors..... | 305 |
| § 4. Son, issue..... | 307 |
| § 5. Illegitimate children..... | 314 |
| § 6. Family..... | 317 |
| § 7. Next of kin..... | 319 |
| § 8. Relations..... | 320 |
| § 9. Stocks and individuals..... | 324 |

CHAPTER XXIV.

LEGACIES.

| | |
|--|-----|
| § 1. Nature of legacies..... | 328 |
| § 2. Legacies classified..... | 330 |
| § 3. Payment of legacies—Interest..... | 343 |
| § 4. Specific devises..... | 345 |
| § 5. Residue—Realty..... | 346 |
| § 6. Residue—Personalty..... | 349 |
| § 7. Cumulative legacies..... | 350 |

CHAPTER XXV.

ADMINISTRATION OF ASSETS.

| | |
|--|-----|
| § 1. General principles..... | 353 |
| § 2. Marshalling of assets..... | 356 |
| § 3. Ademption of legacies..... | 360 |
| § 4. Ademption of specific legacies..... | 361 |
| § 5. Satisfaction of debts by legacies..... | 363 |
| § 6. Satisfaction of portions by legacies..... | 365 |
| § 7. Legacies to debtors..... | 367 |

CHAPTER XXVI.

VOID TESTAMENTARY GIFTS.

| | |
|---|-----|
| § 1. Uncertain gifts..... | 369 |
| § 2. Rule against perpetuities..... | 374 |
| § 3. Accumulation..... | 386 |
| § 4. Restraints upon alienation..... | 389 |
| § 5. Mortmain..... | 392 |
| § 6. Various void gifts..... | 399 |
| § 7. Charitable uses..... | 401 |
| § 8. Religious uses..... | 410 |
| § 9. Immoral gifts..... | 414 |
| § 10. Relations of certain primary to ulterior gifts..... | 415 |
| § 11. Lapse..... | 416 |

CHAPTER XXVII.

SUGGESTIONS, &c.

| | |
|---|-----|
| Suggestions to testamentary draftsmen | 426 |
|---|-----|

[illegible]

| | | | |
|--------------------------------|----------|----------------------------|------------------|
| A. | | Arnold v. Buffum..... 88 | |
| Abbott v. Bradstreet..... | 140, 297 | v. Gilbert..... | 159, 249 |
| v. Browning..... | 297 | Aspden's Estate..... | 297 |
| v. Essex Co. | 84, 124 | Awdry v. Lord..... | 386 |
| Abercrombie v. Abercrombie.. | 55 | Ayres v. Meth. Ep. Ch.. | 394 |
| Ackerman v. Emott..... | 210 | | |
| Adams v. Beekman..... | 264 | B. | |
| v. Brackett..... | 238, 354 | | |
| v. Logan..... | 312 | | |
| v. Wilbur | 8 | Babb v. Harrison..... | 27 |
| Albec v. Carpenter | 95, 110 | v. Reed..... | 412 |
| Alder v. Beall..... | 324 | Bacon's App..... | 78 |
| Aldrich v. Gaskill..... | 66 | Bailey v. Duncan..... | 248 |
| Allen v. Allen..... | 16 | Baker v. Baker..... | 307 |
| v. Hoyt..... | 36, 103 | v. Bridge.... | 77 |
| v. Richards..... | 65 | Baker's App..... | 238 |
| v. Scott..... | 64 | Baldwin v. Baldwin..... | 47 |
| v. White..... | 138 | Ballard v. Carter..... | 182 |
| Allyn v. Mather..... | 117 | Bangs v. Smith. | 71, 350 |
| Am. Asylum v. Phenix Bank... | 402, 403 | Bank v. Phelan..... | 349 |
| Am. Bible Soc. v. Marshall.... | 397 | Baptist As'n v. Hart.. | 403, 408, 409 |
| Anderson v. Greble..... | 89 | Barber v. Barber..... | 343 |
| Andress v. Parsons..... | 418 | v. Cary..... | 211 |
| v. Weller..... | 57 | Barheydt v. Barheydt | 81 |
| Andrew v. N. Y. Bible & Prayer | | Barker v. Cobb..... | 390 |
| Book Soc..... | 392, 409 | v. Woods..... | 264 |
| Annable v. Patch..... | 28, 243 | Barnes v. Allen..... | 311 |
| Annin's Ex'ors v. Vandoren's | | v. Greenzeback..... | 311 |
| Adm. | 372 | Barnitz v. Casey..... | 298 |
| Archer v. Deneale..... | 242 | Bartlett v. King.... | 40, 45, 374, 411 |
| Arcularius v. Geisenheimer... | 29, 30 | v. Nye..... | 395, 407, 412 |
| Armstrong v. Armstrong..... | 124 | Baskin's App..... | 299 |
| v. Moran..... | 299, 420 | Bassett v. Granger..... | 326 |

| | | | |
|--|------------|------------------------------|---------------|
| Bates v. Hillman..... | 53 | Bramhall v. Ferris..... | 279 |
| v. Webb..... | 255 | Bramhill v. Ferris..... | 274 |
| Baylor v. Dejarnette..... | 238 | Brant v. Gelston..... | 102 |
| Beall v. Fox..... | 401 | v. Wilson..... | 6 |
| v. Holmes..... | 31, 75, 77 | Brewers v. Forman..... | 411 |
| Bean v. Hockman..... | 416 | Brewster v. Hill..... | 67 |
| Beard v. Rowan..... | 269 | v. McCall..... | 47 |
| Beatty v. Kinty..... | 401 | Briggs v. Hosford..... | 28 |
| Beck v. McGillis..... | 70, 72 | Brigham v. Winchester..... | 182 |
| Beekman v. People..... | 394, 409 | Brown v. Brown..... | 41, 326 |
| v. Schermerhorn..... | 257 | v. Dysinger..... | 61 |
| Beirne & Wiggenton, Re..... | 68 | v. Kelsey..... | 411 |
| Bell County v. Alexander..... | 83 | v. Lyon..... | 24 |
| Bennet v. Bettle..... | 64 | Browne v. Cogswell..... | 69 |
| Bennett v. Cave..... | 415 | v. Lawrence..... | 140 |
| Berger v. Berger..... | 208 | Brownell v. DeWolf..... | 137 |
| Bernard v. Minshall..... | 221, 227 | Brownson v. Gifford..... | 264 |
| Binnerman v. Weaver..... | 281 | Bryant v. Hunter..... | 366 |
| Birdsall v. Applegate..... | 60 | Bugbee v. Sargent..... | 241 |
| v. Hewett..... | 260 | Bull v. Bull..... | 214, 217, 372 |
| Bishop v. Bishop..... | 420 | Bullard v. Goffe..... | 59, 60 |
| Bishop's Fund Trustees v. Eagle Bank..... | 411 | Bunce v. Vander Grift..... | 158 |
| Blackstone Bank v. Davis..... | 276 | Bundy v. Bundy..... | 207 |
| Blagge v. Miles..... | 208 | Bunner v. Storm..... | 325, 344 |
| Blake v. Stone..... | 93 | Burbank v. Whitney..... | 401 |
| Blaney v. Blaney..... | 345, 355 | Burke v. Chamberlain..... | 78 |
| Bleeker v. Lynch..... | 55 | v. Valentine..... | 125, 184 |
| Bloomer v. Bloomer..... | 11 | Burr v. Smith..... | 411 |
| Bogert v. Hertell..... | 160, 210 | Burrill v. Sheil..... | 257 |
| Bolling v. Bolling..... | 223, 397 | Butler v. Butler..... | 385 |
| Bond's App..... | 298, 424 | Butterfield v. Haskins..... | 89 |
| Bone v. Cook..... | 305 | Button v. Am. Tract Soc..... | 47, 53, 411 |
| Boone v. Dyke's Legatees..... | 265 | Buzby's App..... | 258 |
| Bowers v. Brower..... | 311 | Byrd v. Byrd..... | 30 |
| v. Smith..... | 347 | | |
| Bowker v. Bowker..... | 260, 261 | | C. |
| Bowman's App..... | 264 | | |
| Bradford v. White..... | 167 | Caldwell v. Kinkead..... | 260 |
| Bradhurst v. Bradhurst.... | 24, 211 | Calhoun v. Ferguson..... | 47 |
| Bradish v. Gibbs..... | 287 | Calkins v. Calkins..... | 341 |
| Bradley v. Amidon..... | 40, 344 | Campbell v. Rawdon..... | 296, 304 |
| v. Cartwright..... | 83 | Carle v. Underhill..... | 5 |
| Bradstreet v. Clarke..... | 40 | Carmichael v. Carmichael... | 258, 297 |
| Brailsford v. Heyward..... | 38, 347 | Carr v. Estell..... | 314 |
| Bramble v. Phillips..... | 116 | v. Porter..... | 24, 103 |
| v. Billups..... | 117 | Carroll v. Carroll..... | 8 |

| | | | |
|--|---------------|--|------------------|
| Carroll v. Hancock | 289 | Corbin v. Mills | 336 |
| Carter v. Balfour | 47, 204 | Cordey v. Adams | 103 |
| v. Bloodgood | 41, 204 | Cornell v. Woolley | 16 |
| v. Hunt | 53 | Cornish v. Wilson | 23 |
| v. Tyler | 127 | Cornwell v. Isham | 15 |
| Carver v. Oakley | 288 | Corrigan v. Kiernan | 344 |
| Caw v. Robertson | 264 | Cott v. Cook | 385 |
| Chandler v. Ferris | 54 | Couch v. Gorham | 142 |
| Chase v. Lockerman | 355 | Covenhoven v. Shuler | 37, 340, 362 |
| Chelton v. Henderson | 94 | Cowdin v. Perry | 258 |
| Chestnut v. Strong | 152 | Craig v. Craig | 82, 344, 388 |
| Chew's App. | 104 | v. Scobie | 183 |
| Childs v. Russell | 260 | Crane v. Crane | 245 |
| Chrystie v. Phyfe | 53, 310 | v. Cowell | 88 |
| Church in Brattle Square v. Grant | 141 | Cresson's App. | 402 |
| City Bank v. Smith | 285 | Crockett v. Crockett | 222, 227 |
| Clark v. Bogard | 364 | v. Robinson | 376 |
| v. Clark | 142, 151, 204 | Cromer v. Pinckney | 28, 29, 310, 311 |
| v. Hyman | 83 | Croom v. Keering | 303 |
| v. Lynch | 326 | Crosby v. Wendell | 264 |
| Clayton v. Aiken | 366 | Cuffee v. Milk | 111 |
| Cleveland v. Spilman | 78 | Culbertson v. Daly | 103 |
| Clure v. Latimer | 348 | Cumberland v. Codrington, | 233, 234 |
| Clute v. Pool | 279 | Cunningham v. Speckles | 352 |
| Coates v. Hughes | 7 | Curtis v. Potter | 343 |
| Cogdell v. Cogdell | 187, 361 | Cushing v. Aylwin | 17 |
| Cogglestall v. Pelton | 402 | v. Henry | 204 |
| Collins v. Collins | 296, 330 | Cutter v. Doughty | 129 |
| v. Carlisle | 214, 217 | | |
| v. Hoxie | 325 | D. | |
| Commonwealth v. Leach | 1 | Dabney v. Cottrell | 71 |
| v. Stauffer | 281 | Dallam v. Dallam | 127 |
| Comstock v. Hadlyme | 55 | Daly v. James | 105 |
| Condict v. King | 372 | Dartmouth College v. Wood- ward | 407 |
| Conklin v. Conklin | 265 | Dashwell v. Att'y-Gen. | 395, 396 |
| v. Moore | 259 | Davis v. Cain | 338 |
| Conley v. Kincaid | 297 | v. Calvert | 15 |
| Converse v. Converse | 14 | v. Rainsford | 42 |
| v. Kellogg | 257 | v. Taul | 4, 42 |
| Cook v. Cook | 241 | Day, ex-p. | 5 |
| v. Holmes | 77 | Deakins v. Hollis | 18 |
| Cooke v. Catlin | 312, 326 | Dean v. Nunally | 88 |
| v. Husbands | 75 | DeKay v. Irving | 32 |
| Cooper v. Remsen | 283 | Delamater's Estate | 69 |
| v. Scott | 345 | De Nottebeck v. Astor | 53 |
| Corbett v. Nutt | 16 | | |

| | | | |
|-------------------------------|-------------------|--------------------------------|---------------|
| Den v. Manners..... | 19 | Dunn v. Bray..... | 152 |
| v. McMurtrie..... | 369 | v. Bryan..... | 140 |
| v. Messenger..... | 273 | Dunnage v. White..... | 85 |
| v. Sayre..... | 199 | Dunshee v. Goldbacher..... | 241 |
| v. Small..... | 116 | Durney v. Schaeffler..... | 283 |
| De Peyster v. Clending..... | 142 | Dyck v. Van Beuren..... | 397 |
| v. Michael..... | 390 | | |
| Dermet v. Dermet..... | 102 | | E. |
| Devlin's Estate..... | 345 | Eagle v. Emmet..... | 328 |
| De Witt v. Yates..... | 351 | Earl v. Grim..... | 30 |
| Dey v. Dey..... | 238 | v. Roine..... | 90 |
| Dickenson v. Jordan..... | 202 | Easton, Matter of..... | 5 |
| v. Purvis..... | 424 | Eatherly v. Eatherly..... | 57 |
| Dickinson v. Lee..... | 297 | Eaton v. Benton..... | 363 |
| Dietrich v. Dietrick..... | 54 | Edelen v. Middleton..... | 128 |
| Dingley v. Dingley..... | 28, 254, 255 | Edwards v. Bishop..... | 83 |
| Dodge v. Manning..... | 238 | Eldridge v. Eldridge..... | 254, 262 |
| v. Moore..... | 241 | Elliott's will..... | 54 |
| Dodson v. Green..... | 43, 371 | Ellis v. Essex M. Bridge..... | 76, 94, 151 |
| Doe v. Craiger..... | 117 | Emerson v. Culter..... | 140, 265 |
| v. Dill..... | 78 | Engliss v. Sailors Snug Harbor | 85 |
| d. Goldin v. Lakeman..... | 89 | Enlaws v. Enlaws..... | 78 |
| v. Howland..... | 80, 83 | Ennis v. Pentz..... | 321, 323 |
| v. Prevoost..... | 139 | v. Plenty..... | 263, |
| v. Townsend..... | 193 | v. Smith..... | 328 |
| v. Watson..... | 125 | Enohin v. Wylie..... | 10 |
| Domestic & For. Soc. App..... | 53, 405 | Erickson v. Willard..... | 217 |
| Dominick v. Michael..... | 158 | Errington v. Evans..... | 364 |
| v. Moore..... | 204 | Evangelical As'n App..... | 403 |
| v. Sayre..... | 314 | Evarts v. Chittenden..... | 94 |
| Donahue v. Lea..... | 361 | Everett v. Lane..... | 338 |
| Dorland v. Dorland..... | 210 | v. Everett..... | 386 |
| Dorsley v. Hammond..... | 43 | Evers v. Challis..... | 141 |
| Dott v. Cunningham..... | 94, 107 | | |
| Doubleday v. Newton..... | 291 | | F. |
| Douglas v. Blackford..... | 46 | Fagan v. Jones..... | 333 |
| Downing v. Bain..... | 34 | Farwell v. Jacobs..... | 223, 397 |
| v. Marshall..... | 421 | Fay v. Cheney..... | 71, 72 |
| v. Wherrin..... | 119, 140 | v. Fay..... | 76, 89 |
| Drake v. Pell..... | 41, 155, 257, 298 | Felton v. Sawyer..... | 141 |
| Drayton's App..... | 363 | Fenwick v. Chapman..... | 23, 242 |
| Drayton v. Drayton..... | 311 | v. Macey..... | 183 |
| Drew v. Drew..... | 43, 371, 372 | Ferguson v. Zepp..... | 59, 79 |
| Dubois v. Ray..... | 130 | Ferril v. Talbot..... | 308 |
| Duke v. Fuller..... | 403 | Ferris v. Smith..... | 78 |
| Dumond v. Stringham..... | 83, 85, 130 | Ferson v. Dodge..... | 255, 257, 260 |
| Dunlap v. Pyle..... | 210 | | |

| | | | |
|---------------------------------|---------------------|---------------------------------------|----------|
| Fetrom's Estate | 140 | Germond v. Jones | 210 |
| Field v. Mostyn | 366 | Gernet v. Lynn | 104, 105 |
| Finch v. Houghton | 367 | Gibbons v. Hill | 332 |
| Findlay v. Riddle | 96, 104 | Gibson v. Horton | 80 |
| Finlay v. King. | 30, 31, 35, 272 | v. M'Call | 413 |
| Fisher v. Hill | 205 | Giddings v. Smith | 117 |
| v. Taylor | 391 | Gifford v. Dyer | 57 |
| Fish's Estate | 345 | v. Thorn | 260 |
| Fisk v. Cushman | 70 | Gilbert v. Chapin, 215, 217, 220, 221 | |
| v. Keene | 143 | Gilbreath v. Winter | 332 |
| Fitch v. Peckham | 364 | Gillian v. Underwood | 304 |
| Flandears v. Lamphear | 285 | Gilman v. Hamilton | 405, 410 |
| Florey v. Florey | 55 | Gilmer v. Gilmer, 236, 331, 363, 408 | |
| Fogg v. Clark | 61, 78 | Gleason v. Fayerweather | 276 |
| Foot v. App. | 28, 237, 244 | Godfrey v. Humphry | 60, 77 |
| Exp. | 340 | Going v. Emery | 409, 411 |
| Ford v. Ford | 361 | Gold v. Judson | 17 |
| Fosdick v. Fosdick | 388 | Goodall v. McLean | 204 |
| Foster v. Kerr | 286 | Goode v. Goode | 43 |
| Fountain v. Ravenel | 421 | Goodrich v. Lambert | 94 |
| Fowler v. Depau...110, 193, 204 | | Gore v. Stevens | 74 |
| 377, 386 | | Gray v. Blanchard | 277 |
| Fox v. Phelps. | 79, 81, 82, 89, 270 | v. McDowell, | 238, 239 |
| Frazier v. Frazier | 348 | Grayhead v. Given | 422 |
| Freeborn v. Wagner | 102 | Greenenough v. Wells | 210 |
| Freedley's App. | 183 | Greer v. Dennis | 422 |
| Freeman v. Flood | 286 | Greere v. Davis | 403 |
| Fuller v. Winthrop | 258 | Gridley v. Gridley | 242, 270 |
| v. Yates | 76 | Griffin v. Graham | 395, 401 |
| Furness v. Fox | 262 | Grim v. Dyar | 41 |
| | | Griswold v. Greer | 124 |
| | | Guthries App. | 102, 104 |
| G. | | | |
| Gage v. Gage | 7 | H. | |
| Gaines v. Rolt | 2 | Hacker v. Newborn | 54 |
| Gallego v. Att'y-Gen. | 396, 403 | Hall v. Dickinson | 78 |
| v. Gallego | 356 | v. Tufts | 274 |
| Gamble v. Dabney | 214, 217 | v. Wooller | 297 |
| Gardner v. Gardner | 241, 242 | Hallett v. Pope | 119 |
| v. Wagner | 31, 65 | Hallowell v. Phipps | 310, 323 |
| Garnet v. Macon | 238 | Hamilton v. Bishop | 287 |
| Garrison v. Eborn | 70 | v. Boyles | 41 |
| Gass v. Ross | 49 | v. Henstead | 117 |
| v. Wilhite | 402, 410, 413 | Hamlin v. Osgood | 307 |
| Gates v. Jacob | 182 | | |
| Gerard Will Case | 402 | | |
| Gerken's Estate | 238 | | |

| | | | |
|------------------------------|---------------|------------------------------------|---------------|
| Hammersley v. Smith | 391 | Hone v. Kent | 73 |
| Hammond v. Ridgley | 43, 372 | v. Van Schaik .. | 129, 296, 311 |
| Hand v. Hoffman | 49 | Hood v. Archer | 14 |
| Hansell v. Hubbell | 111 | Hoopes v. Dundas | 282 |
| Hapgood v. Houghton | 250 | Horwitz v. Norris | 245 |
| Hardy v. Redman | 88 | Howland v. Union Theo. Sem. 6, | 53 |
| Harper v. Blean | 68 | Hoyland v. Schenck's Estate ... | 343 |
| v. Phelps | 372 | Hubbell v. Hubbell | 354 |
| Harrington v. Bradford | 4 | Hughes v. Boyd | 282, 283 |
| v. Hughes | 251 | v. Knowlton | 315 |
| Harris v. Clark | 156 | v. Dehon | 233, 234 |
| v. Finch | 343 | Hull v. Hull | 416 |
| v. Fly | 238, 241, 259 | Hume v. Wood | 238, 354 |
| v. Hearne | 270 | Hunnier v. Rogers | 241 |
| Harrison v. Morton | 55 | Hunt v. Hunt | 60 |
| v. Nixon | 10, 31 | Hunter v. Bryant | 251 |
| Hart v. Hart | 223, 397 | v. Hunter | 29, 83, 234 |
| v. Marks | 74 | Hurdle v. Outlaw | 61 |
| Haskins v. Tate | 289 | Hyatt v. Pugsley | 30, 421 |
| Hawes v. Humphrey | 15 | | |
| v. Sackett | 249, 253 | | |
| Hawes Place Soc. v. Hawes | | | |
| Fund | 186, 217 | | |
| Hawkins v. Everett | 265, 295 | | |
| Hawley v. James | 155, 156, | | |
| 233, 243, 246, | 386 | | |
| v. Northampton. | 28, 111, | | |
| 141, | 279 | | |
| Hawn v. Banks | 297 | | |
| Haxton v. Corse | 158, 386, 389 | | |
| Hayden v. Stoughton | 28, 422 | | |
| Heard v. Horton | 81, 301 | | |
| v. Sill | 186 | | |
| Heath v. Knapp | 227 | | |
| Hedges v. Riker | 210 | | |
| Henry v. Gorterman .. | 81 | | |
| Hester v. Hester | 186 | | |
| Hildyard v. Miller | 389 | | |
| Hill v. Bowman | 46 | | |
| Hodgson v. Gemmil | 258 | | |
| Hoke v. Herman | 361, 362 | | |
| Holland v. Peck | 409 | | |
| Hollins v. Coonan | 39 | | |
| Holman v. Perry | 13 | | |
| Holme v. Low | 141 | | |
| Holmes v. Field | 282 | | |
| Homer v. Shelton | 151 | | |
| | | | |
| | | I. | |
| | | Ide v. Ide | 24, 141, 143 |
| | | Ingersoll v. Knowlton | 103 |
| | | Inglis v. Trustees of the Sailors' | |
| | | Snug Harbour | 23 |
| | | Irving v. De Kay | 386 |
| | | Isham v. Gibbons | 11 |
| | | | |
| | | J. | |
| | | Jackman v. Yates | 71 |
| | | Jackson v. Babcock | 5, 81 |
| | | v. Bull | 79, 83 |
| | | v. Burr | 78, 210 |
| | | v. Chew | 87 |
| | | v. Coleman | 89 |
| | | v. Delany | 60, 187 |
| | | v. Hammond | 412 |
| | | v. Hansel | 61 |
| | | v. Harris | 81 |
| | | v. Housel | 83 |
| | | v. Martin | 79, 81 |
| | | v. Merrill | 79 |
| | | v. Merger | 65, 66 |
| | | v. Roberts | 421 |
| | | v. Robins | 89 |

| | | | |
|----------------------------|------------|--------------------------------|--------------|
| Jackson v. Schurtz | 276 | | |
| v. Sill..... | 42 | | L. |
| v. Staats | 323 | | |
| v. Varick..... | 20 | Ladd v. Harvey..... | 128 |
| v. Waldron | 20 | Lambert v. Paine | 24, 88 |
| v. Winnie..... | 264 | Lane v. Lane..... | 259 |
| James v. James | 74, 349 | v. Vick..... | 23, 30 |
| Janey v. Latane | 47 | Lang v. Rofke..... | 184 |
| Jarvis v. Prentice..... | 286 | Langdon v. Astor | 4, 5 |
| v. Quigley | 104 | Larke v. Mann..... | 240 |
| Jenkins v. Fryer..... | 289 | Lasher v. Lasher..... | 29 |
| Johnson v. Farrell..... | 363 | Lawrence v. Hebbard..... | 295, 311 |
| v. Johnson. | 75, 117 | v. Lawrence..... | 328 |
| Jones v. Creveling..... | 352 | Learned v. Tallmadge | 208 |
| v. Jones | 286 | Leary's Estate..... | 406 |
| | | Leaver v. Lewis | 243 |
| | | Leddel v. Starr..... | 345 |
| | | Leith, <i>ex p.</i> | 324 |
| | | Leland v. Adams | 325 |
| | | Leonard v. White..... | 64 |
| | | Lewis v. Smith..... | 78, 246 |
| | | v. Thornton..... | 238 |
| | | Lide v. Lide | 54 |
| | | Liffen v. Eldred..... | 83 |
| | | Lillard v. Reynolds | 369 |
| | | Lilliebridge v. Addie..... | 88, 112 |
| | | Lilly v. Curry | 363 |
| | | Lindsay v. McCormack..... | 77 |
| | | Lippett v. Hopkins..... | 84 |
| | | Lithgow v. Havenagh | 79 |
| | | Livingston v. Livingston | 356 |
| | | Livingstone v. Newkirk | 235 |
| | | Lone v. Williamson..... | 15 |
| | | Lorillard v. Coster..... | 37, 155, 311 |
| | | Loring v. Blake..... | 377 |
| | | v. Loring..... | 345 |
| | | Lovering v. Minot..... | 152 |
| | | Lovett v. Gillender | 258 |
| | | v. Kingsland..... | 53 |
| | | Lucas v. Lockhart | 217 |
| | | Ludlam's Estate | 331, 337 |
| | | Lupton v. Lupton | 233, 240 |
| | | Lush v. Druse | 42 |
| | | Lydnor v. Lydnor | 223 |
| | | Lyles v. Digge..... | 102 |
| | | Lyman v. Parsons | 263 |
| | | v. Vanderspiegel..... | 419 |
| K. | | | |
| Kane v. Astor..... | 6, 30, 254 | | |
| v. Gott..... | 155 | | |
| Keith v. Perry..... | 38 | | |
| Kelley v. Kelley..... | 49, 369 | | |
| Kellogg v. Blair..... | 60 | | |
| Kempton App..... | 245 | | |
| Kennedy's App..... | 194 | | |
| Kerr d. Bosler..... | 258 | | |
| Kihler v. Whitman..... | 261 | | |
| Killam v. Allen | 184, 386 | | |
| Kilpatrick v. Johnson..... | 295 | | |
| King v. Ackerman..... | 88 | | |
| v. Merchants' Exchange | | | |
| Co..... | 184 | | |
| v. Rundell..... | 386 | | |
| v. Woodhull..... | 155, 344 | | |
| Kingsland v. Betts..... | 211 | | |
| v. Rapelye..... | 24, 307 | | |
| Kinne v. Kinne..... | 14 | | |
| Kinter v. Jenks..... | 84, 227 | | |
| Kip v. Kip..... | 30, 31, 32 | | |
| v. Van Cortland | 347 | | |
| Knight v. Knight..... | 296 | | |
| v. Weatherwise..... | 6 | | |
| Knollys v. Shepherd | 64 | | |
| Knott v. Cotete..... | 221 | | |
| Korn v. Cutler | 60 | | |

| | | | |
|---------------------------------|---------------|------------------------------|---------------|
| Lynch v. Hill | 41 | Meek v. Holtom | 27 |
| Lyon v. Acker | 24, 297, 325 | Merritt v. Brantley | 81 |
| M. | | Merrymans v. Merrymans .. | 313, 316 |
| | | Meyers v. Eddie | 34 |
| | | v. Meyers | 293 |
| Maddox v. Maddox | 273, 283 | Miles v. Boyden | 312, 313 |
| Mahar v. O'Hara | 238 | Miller v. Chittenden | 140 |
| Malcolm v. Malcolm | 40 | Miller's App. | 238 |
| Malone v. Mooring | 331 | Minor v. Dabney | 339 |
| Manderson v. Lukens | 140 | Minot v. Boston Asylum | 47 |
| Manice v. Manice | 331, 335 | v. Prescott | 211 |
| Mann v. Mann | 53, 70, 157 | Moakly v. Riggs | 273 |
| Mapes v. Tyler | 210 | Moffat v. Strong | 94, 151, 385 |
| Marsh v. Hague | 261 | Moggridge v. Thackwell | 412 |
| v. Wheeler | 30 | Monroe v. Douglas | 105 |
| Marshall v. Downing | 395 | Moody v. Walker | 127, 151 |
| Martha May's App. | 424 | Mooltrie v. Hunt | 11 |
| Martindale v. Martindale | 29 | Moon v. Stone | 258 |
| Mason v. Jones | 37 | Moore v. Budd | 12 |
| v. White | 312 | v. Howe | 119 |
| Maxwell v. Means | 384 | v. Lyons | 193, 198 |
| Mayrant v. Davis | 338 | v. Moore | 269, 377 |
| Mayzcker v. Mayzcker | 119 | Morancy v. Quarles | 243 |
| McAfee v. Gilmore | 78 | Morrell v. Dickey | 39 |
| McAuley v. Wilson | 402, 409, 410 | v. Emery | 5 |
| McBride v. Elmer | 47 | v. Sutton | 271 |
| McCormick <i>ex p.</i> | 11 | Morris, Estate of. | 20 |
| McC Campbell v. McC Campbell .. | 355 | v. Henderson | 348 |
| McCulloch v. McLain | 242 | Morrison v. Semple | 61 |
| McDermott v. United States Ins. | | v. Temple | 60 |
| Co. | 45 | Morse v. Mason | 296 |
| McDonough v. Murdock | 32, 403 | Morton v. Barrett | 320 |
| McDowell v. Laules | 355 | v. Morton | 344 |
| McFeely v. Moore | 102 | v. Perry | 70 |
| McGill's App. | 258 | Mountain v. Bennett | 54 |
| McGinn v. Aaron | 411 | Mowatt v. Carow | 296 |
| McIlvain v. Githin | 281 | Muller, Estate of. | 29 |
| McKay v. Green | 233 | Murdock v. Shackelford | 112 |
| McKee v. McKinlay | 78, 104 | Murphy v. Harvey | 298, 325 |
| McKenzie v. Jones | 78 | Musselman's Estate | 78 |
| McLaughlin, Matter of | 210 | N. | |
| McLellan v. Kennedy | 12 | | |
| McMahon v. Ryan | 54 | Nagle's App. | 78, 104 |
| McNaughton v. McNaughton .. | 362 | Nelson v. Moore | 205 |
| McWilliams v. Nisley | 276, 391 | Newkirk v. Newkirk .. | 274, 277, 279 |
| Meakings v. Cromwell | 155 | Newton v. Griffith | 75, 117 |

| | | | |
|------------------------------|---------------|-----------------------------------|------|
| Nichols v. Romaine | 41 | Peay v. Barber | 349 |
| Nightingale v. Burrell | 111 | Peck v. Henderson | 210 |
| v. Sheldon | 420 | Penniman v. French | 69 |
| Norris v. Boyes | 384 | Pennock's Estate, <i>Re</i> | 372* |
| v. Byea | 130, 204, 269 | Pennoyer v. Sheridan | 31 |
| v. Thompson | 334 | People v. Conklin | 400 |
| Nussea v. Arnold | 54 | Peppin v. Ellison | 69 |

O.

| | | | |
|--|---------------|------------------------------|----------|
| Oddie v. Woodford | 33 | Phyfe v. Phyfe | 314 |
| O'Hara v. Sullivan | 246 | Physick's App | 78 |
| Okeson's App | 238 | Pickering v. Pickering | 238 |
| Olmstead v. Olmstead | 78, 252 | Pierce v. Hakes | 140 |
| Olney v. Hull | 140 | v. Win | 276 |
| O'Neil v. Murray | 55 | Pike v. Stephenson | 258 |
| O'Riley v. Nicholson | 253 | Pinckney v. Pinckney | 251 |
| Orphan Asylum v. McCarter ... | 396 | Pinney v. Fancher | 264, 344 |
| Osborne v. Shrieve | 106 | Pippin v. Ellison | 83 |
| Osgood v. Franklin | 159 | Plempstor v. Plempstor | 140 |
| v. Livering | 247 | Polk v. Faris | 102 |
| Otis v. Smith | 64 | Pollard v. Dwight | 23 |
| Owens v. Miss. Soc. of M. E. Church | 395, 407, 408 | v. Pollard | 343 |
| Oxley v. Lane | 33 | Pond v. Bergh | 37, 41 |

P.

| | | | |
|---------------------------------------|----------|----------------------------------|---------------|
| Page v. Wright | 86 | Porter's App | 298 |
| Painter v. Painter | 249 | Portsmouth v. Shackford | 207 |
| Parish v. Parish | 78 | Post v. Hover | 53, 416 |
| Parker v. Parker | 77, 145 | v. Post | 34 |
| Parkman v. Bowdoin | 313 | Potter v. Gardner | 243 |
| Parks v. Parks | 40 | v. Titcomb | 11 |
| Parsons v. Lynam | 11 | Pratt v. Flamen | 315 |
| v. Snook | 253 | v. Rice | 39 |
| v. Winslow | 281, 400 | Pray v. Belt | 52, 268 |
| Passmore's App | 197 | Prescott v. Prescott | 17, 104, 422 |
| Patterson v. Doe | 103 | Prewett v. Land | 186, 214, 217 |
| v. Devlin | 142 | Price v. Brown | 8 |
| v. Ellis .. 82, 130, 151, 262, 384 | | v. Maxwell .. 401, 402, 408, 412 | |
| v. McMasters | 304 | Prowett v. Rodman | 323 |
| Pattison v. Pattison | 361 | Pryor v. Dunkle | 137 |
| Payne v. Sale | 102 | Putnam v. Gleeson | 140 |
| Payton v. Smith | 76 | | |

Q.

| | |
|--------------------------|----|
| Quillman v. Custer | 78 |
| Quincy v. Rogers | 6 |

| R. | | Saunders v. Hyatt 1. | |
|--|--------------|-----------------------------------|-----------------|
| Rapelye v. Rapelye | 342 | Savage v. Burnham | 155, 2 |
| Rathbone v. Dyckman | 30, 81 | Schermerhorn v. Barhydt | 1 |
| Ray v. Enslin | 38 | v. Schermerhorn | 1 |
| Reed v. Reed | 89, 215, 222 | Schettler v. Smith | 345, 38 |
| v. Underhill | 159 | Schoonmaker v. Stockton | 79, 10 |
| Renwize v. Cooper | 71 | Schryer's Estate | 34 |
| Reynolds v. Reynolds | 241 | Scott v. Morell | 21 |
| v. Swan | 2 | Seabury v. Brewer | 32 |
| Rhoads v. Rhoads | 387 | Seaver v. Lewis | 2 |
| Richardson v. Wheatland | 303 | Shackleford v. Hall | 28 |
| Richmond v. Vanhoof | 70, 71 | Sharon v. Simons | 186, 21 |
| Ricks v. Williams | 303, 304 | Sharpsteen v. Tillon | 26 |
| Ridgeley v. Bond | 348 | Shearman v. Angel | 315, 41 |
| Roberts' App. | 258 | Sheridan House | 10 |
| Roberts v. Kuffin | 70 | Sherman v. Sherman | 1 |
| v. Ogbourne | 78 | Sherry v. Lozier | 3 |
| Robertson v. Johnson | 29 | Sholl v. Sholl | 32 |
| Robinson v. Schley | 27 | Shotwell v. Mott | 40 |
| Rogers v. Smith | 64 | Shriver v. Lynn | 8 |
| Roman Catholic German Church of Albany v. Wachter | 238 | Shutt v. Rainbow | 7 |
| Roman Cath. Orph. As. v. Em- mons | 42 | Simmonds v. Simmonds | 6, 27 |
| Roome v. Phillips | 258 | Simmons v. Garrot | 29 |
| Roosevelt v. Heirs of Fulton | 78 | Simpson v. Moore | 34 |
| v. Thurman | 38 | Simson v. Smith | 31 |
| Ross v. Toms | 117 | Sisson v. Seabury | 10 |
| v. Tremaine | 273 | Slocum v. Slocum | 15 |
| Rothmaler v. Myers | 43, 307, 370 | Small v. Small | 5 |
| Routh v. Ammerman | 71 | Smiley v. Bailey | 18 |
| Roy v. Garnet | 102 | Smith v. Ashurst | 29 |
| Ruffert's Estate | 345 | v. Bell | 30, 31, 107, 32 |
| Runnels v. Runnels | 270 | v. Clerk | 39 |
| Russell v. Elden | 77 | v. Dunwoody | 6 |
| Ruston v. Ruston | 23 | v. Edrington | 1 |
| | | v. Hastings | 9 |
| | | v. Jewett | 70 |
| | | v. Jones | 20, 36 |
| | | v. Kearney | 15 |
| | | v. Lampton | 33 |
| | | v. Post | 8 |
| | | v. Poyas | 7 |
| | | v. Smith | 42, 47, 374 |
| | | v. Wyckoff | 42, 24 |
| | | Trustees of | 26 |
| | | Smith's App. | 124, 151, 311 |
| | | Case | 311 |
| | | Smithwick v. Jordan | 1 |
| S. | | | |
| Sackett v. Mallory | 137 | | |
| St. Armour v. Rivard | 385 | | |
| St. Louis Hosp. As. | 47 | | |
| Salmon v. Stuyvesant. | 9 | | |
| Sands v. Champlin | 81 | | |
| v. Chaplin | 241 | | |
| Sargeant v. Towne | 76, 77 | | |

| | | | |
|-------------------------------|--------------|-----------------------------|-------------|
| Sorelle v. Sorelle..... | 364 | Taylor v. Richardson..... | 400 |
| Sparks v. Weedon..... | 337 | Telfair v. Horne..... | 47 |
| Stanley v. Colt..... | 31 | Temple v. Nilson..... | 269 |
| Stark v. Smiley..... | 268 | Terpenning v. Skinner..... | 53 |
| State v. Hallett..... | 12 | Theo. Sem. v. Childs..... | 394 |
| v. Nicolls..... | 23 | Trustees of, v. Kellogg | 89 |
| v. Walter..... | 403 | Thomason v. Andersons..... | 116 |
| v. Wiltbank..... | 403 | Thompson v. Carmichael..... | 370 |
| Steel v. Cook..... | 61, 102 | v. Macdonald..... | 414 |
| Steiner v. Koll..... | 78 | v. McKisick..... | 3, 72 |
| Stephens v. Evans..... | 141 | v. Thompson..... | 233, 254 |
| Stevens v. Ely..... | 160 | Thomson v. Livingston..... | 8, 385 |
| v. Snelling..... | 42 | Tift v. Porter..... | 338 |
| Stevenson v. Schriver..... | 286 | Tillinghast v. Cook..... | 326 |
| Stewart, Matter of..... | 14 | Timothy v. Camp..... | 276 |
| v. Brady..... | 276 | Tinsley v. Jones..... | 116 |
| v. Chambers..... | 41, 344 | Tissel's App..... | 324 |
| v. Garnett..... | 82, 89 | Tobias v. Ketchum..... | 253 |
| v. Lispenard..... | 14 | Tomlinson v. Tomlinson..... | 6 |
| Stickle's App..... | 39 | Tongue v. Nutwell..... | 348, 422 |
| Stires v. Van Rensselaer..... | 295, 296 | Townsend v. Downer..... | 27, 369 |
| Stockes v. Tilly..... | 39 | Tracy v. Kilborn..... | 77 |
| Stockton v. Turner..... | 274 | v. Tracy..... | 244 |
| Storer v. Berndt..... | 297, 298 | Trippe v. Frazier..... | 44, 370 |
| v. Wheatly..... | 320 | Trotter v. Trotter..... | 10 |
| Storing v. Borren..... | 253 | Trustees v. Peasley..... | 46, 47, 374 |
| Stowe v. Ward..... | 301 | Tucker v. Bishop..... | 296 |
| Stower v. Stower..... | 103 | Turk <i>ex p.</i> | 262, 264 |
| Stubbs v. Sargon..... | 397 | Turner v. Kittrell..... | 78 |
| Stultz v. Keser..... | 71 | Twining v. Powell..... | 362 |
| Sullivan v. Mara..... | 253 | | |
| Sutton v. Cole..... | 46 | | |
| Swain v. Roscoe..... | 96, 107 | | |
| Swett v. City of Boston..... | 71, 72 | | |
| Sweet v. Chase..... | 39, 259, 263 | | |
| v. Geisenheimer..... | 29, 30, 328 | | |
| Swoope's App..... | 356 | | |

T.

| | |
|---------------------------|---------------|
| Taft v. Morse..... | 242, 244 |
| Tanner v. Livingston..... | 81 |
| Taylor v. Benham..... | 210 |
| v. Kelley..... | 27 |
| v. Lanier..... | 365 |
| v. Mason..... | 271, 274, 384 |
| v. Morris..... | 211 |

U.

| | |
|---------------------------------|-----|
| United States v. Arredondo..... | 274 |
|---------------------------------|-----|

V.

| | |
|---------------------------------|---------------|
| Vail v. Vail..... | 156, 188, 274 |
| Van Alstyne v. Van Alstyne..... | 330 |
| Van Bulhard v. Nace..... | 61 |
| Vandemark v. Vandemark..... | 6 |
| Van der Volgen v. Yates..... | 398, 413 |
| Vandervoort, Matter of..... | 211 |
| Van Derzee v. Van Derzee..... | 31, 82 |
| Van Dyke's App..... | 252 |
| v. Edmonds..... | 82 |

ENGLISH CASES CITED.

A.

| | | | |
|--------------------------------|---------------|-------------------------------|--------------|
| Abney v. Miller..... | 361 | Attorney-Gen. v. Pearson..... | 411 |
| Abrey v. Newman..... | 324 | v. Price..... | 156, 322 |
| Acherley v. Vernon..... | 63 | v. Ramsay's Trus- | |
| Ackland v. Lutley..... | 177 | tees..... | 156 |
| Ackroyd v. Smithson..... | 157 | v. Sibthorp..... | 46 |
| Adamson v. Armitage..... | 61 | Audsley v. Horn..... | 101 |
| Adlington v. Cann..... | 186 | Auther v. Auther..... | 333 |
| Adman v. Cole..... | 409 | Avelyn v. Ward..... | 335, 415 |
| Aiton v. Brooks..... | 193 | Averall v. Wade..... | 360 |
| Aldrich v. Cooper..... | 357 | | |
| Allan v. Backhouse..... | 90, 239 | B. | |
| Allen v. Callow..... | 418 | Bailey v. Mollard..... | 316 |
| Ancaster (Duke of) v. Mayer... | 239 | Barker v. Giles..... | 195, 200 |
| Andrews v. Emmott..... | 209 | v. Greenwood..... | 175 |
| v. Fullham..... | 415 | Barlow v. Grant..... | 224 |
| v. Partington..... | 289, 294 | Barnardiston v. Carter..... | 256 |
| Andress v. Weller..... | 57 | Barnes v. Patch..... | 317 |
| Anison v. Simpson..... | 349 | Bayne v. Crowther..... | 217 |
| Appleton v. Rowley..... | 110, 122 | Beaumont v. Fell..... | 35 |
| Archer's Case..... | 106, 111, 301 | Beevor v. Partridge..... | 224 |
| Armitage v. Williams..... | 282 | Benson v. Whittam..... | 223 |
| Arnold v. Chapman..... | 419 | Berkeley v. Swinburne..... | 254 |
| v. Congreve..... | 383 | Bernal v. Bernal..... | 300 |
| Arrow v. Mellish..... | 324 | Berry v. Briant..... | 203 |
| Ashley v. Ashley..... | 147 | Bickham v. Cruttwell..... | 232, 236 |
| Ashton v. Ashton..... | 335 | Biddle v. Perkins..... | 382 |
| Aston v. Wood..... | 372 | Birch v. Wade..... | 225 |
| Atkins v. Hiccocks..... | 262 | Bird v. Wood..... | 226 |
| Attorney-Gen. v. Clarke..... | 408 | Blackburn v. Staples..... | 99, 100, 101 |
| v. Davies..... | 398, 406 | Blackwell v. Bull..... | 167 |
| v. Earl of Lons- | | Blague v. Gold..... | 42, 43 |
| dale..... | 402 | Bland v. Bland..... | 371 |
| v. Goulding..... | 406 | Blandford v. Thackerell..... | 406 |
| v. Henchman..... | 163 | Blayne v. Gold..... | 371 |

| | | | |
|--|-------------------------|---|----------|
| Blewitt <i>v.</i> Stauffers | 199 | Carter <i>v.</i> Bentall | 319, 324 |
| Blinston <i>v.</i> Warburton | 121 | Cary <i>v.</i> Abbot | 411, 412 |
| Blurdell, <i>In re</i> | 413 | <i>v.</i> Cary | 221 |
| Booth <i>v.</i> Vicars | 306 | Chalmers <i>v.</i> Storril | 246 |
| <i>v.</i> Blundell | 90, 211, 243 | Chamberlaine <i>v.</i> Turner | 371 |
| Boraston's Case | 257, 258 | Chamberlayne <i>v.</i> Chamberlayne | 301 |
| Boughton <i>v.</i> Boughton | 253 | Chambers <i>v.</i> Atkins | 227 |
| Bowman <i>v.</i> Milbanke | 43, 370 | <i>v.</i> Taylor | 299 |
| Boyce <i>v.</i> Hanning | 382 | Chancey's Case | 364 |
| Boys <i>v.</i> Bradley | 320 | Chapman's Case | 318 |
| Bradshaw <i>v.</i> Tasker | 413 | Chauncey <i>v.</i> Graydon | 283 |
| Brandon <i>v.</i> Robinson | 279 | Chaworth <i>v.</i> Beach | 333 |
| Brederman <i>v.</i> Seymour | 356 | Chichester <i>v.</i> Bickerstaff | 250 |
| Bridge <i>v.</i> Abbot | 305 | Church <i>v.</i> Mundy | 62 |
| Bridgman <i>v.</i> Dove | 239 | Clapton <i>v.</i> Bulmer | 225 |
| Briggs <i>v.</i> Penny | 217, 221, 222, 227 | Clark <i>v.</i> Clark | 345 |
| Bristol (Countess of) <i>v.</i> Hungerford | 163 | Clergy Society, <i>In re</i> | 46 |
| Bristowe <i>v.</i> Ward | 382 | Clifford <i>v.</i> Lewis | 240 |
| Brograve <i>v.</i> Winder | 204 | Clulow's Trust | 388 |
| Brown <i>v.</i> Bigg | 157 | Cockran <i>v.</i> Cockran | 18 |
| <i>v.</i> Higgs | 213, 216, 217, 220, 225 | Cole <i>v.</i> Scott | 18 |
| Browne <i>v.</i> Paull | 222 | <i>v.</i> Sewell, 192, 193, 194, 376, 378 | |
| Bryan <i>v.</i> Twigg | 194 | <i>v.</i> Wade | 225 |
| Bryant's Trusts | 323 | Collins <i>v.</i> Wakeman | 164 |
| Buckle <i>v.</i> Fawcett | 199, 280, 313 | Collis <i>v.</i> Robins | 240 |
| Bullock <i>v.</i> Bennett | 280 | Colpoys <i>v.</i> Colpoys | 43 |
| <i>v.</i> Downes | 133 | Colsha <i>v.</i> Cheese | 422 |
| Bunting <i>v.</i> Marriott | 397 | Combe <i>v.</i> Hughes | 388 |
| Burchett <i>v.</i> Durdaunt | 299 | Combez <i>v.</i> Hill | 146 |
| Burke <i>v.</i> Annis | 123 | Conron <i>v.</i> Conron | 241 |
| Burnaby <i>v.</i> Griffin | 146 | Cooke <i>v.</i> Bowler | 381 |
| Burr <i>v.</i> Smith | 411 | <i>v.</i> Cooke | 307 |
| Butler <i>v.</i> Stratton | 307 | <i>v.</i> Dawson | 240 |
| Byrne <i>v.</i> Blackburn | 222 | <i>v.</i> Gerrard | 169 |
| C. | | Cooper <i>v.</i> Williams | 44, 371 |
| | | Coote <i>v.</i> Boyd | 351 |
| Cadell <i>v.</i> Palmer | 375 | Corbett's Will, <i>In re</i> | 150 |
| Cadogan <i>v.</i> Ewart | 178 | Corbyn <i>v.</i> French | 205 |
| Calthorpe <i>v.</i> Gough | 415 | Cordall's Case | 177 |
| Calvin's Case | 1 | Costabadie <i>v.</i> Costabadie | 222 |
| Cambridge <i>v.</i> Rous | 382 | Cotton <i>v.</i> Cotton | 305, 306 |
| Camfield <i>v.</i> Gilbert | 62 | Coulson <i>v.</i> Coulson | 97 |
| Campbell <i>v.</i> Campbell | 366 | Courtenay <i>v.</i> Ferrers | 339 |
| | | Cowan <i>v.</i> Harrison | 224 |
| | | Crawford, <i>In re</i> | 305 |
| | | Creed <i>v.</i> Creed | 334, 335 |
| | | Crichton <i>v.</i> Symes | 349 |

| | | | |
|--|----------|------------------------------------|----------|
| Cripps v. Woolcott | 199, 201 | Doe d. Clayton | 82 |
| Croft v. Slee | 418 | d. Compere v. Morris | 178 |
| Crooke v. Brooking | 323 | d. Cooper v. Collis | 309 |
| v. De Vandes | 350 | v. Dacre | 255 |
| Crotchett v. Taynton | 312 | d. Davies v. Davies | 178 |
| Crowder v. Stone .. 190, 191, 192, 195 | | d. Ellis v. Ellis | 302 |
| Crozier v. Fisher | 202 | d. Elton v. Stenlake | 40 |
| Cruise v. Barley | 419 | v. Field | 177 |
| Crump v. Coleman | 221, 318 | v. Frost | 121 |
| Cuishan v. Newland | 318 | v. Gallini | 36 |
| Curtis v. Price | 174 | d. Goldin v. Lakeman | 89 |
| v. Rippon | 223 | d. Gorges v. Webb | 146, 148 |
| D. | | d. Hayter v. Joinville | 48, 318 |
| Daniell v. Daniell | 201 | v. Hicks | 176 |
| Danvers v. Manning | 57 | d. Hiscocks v. Hiscocks | 49 |
| Dark v. Fenner | 107 | d. Homfray | 174 |
| Darrel v. Malesworth | 205 | d. v. Huthwaite | 47 |
| Dashwood v. Peyton | 167 | d. James v. Hallett | 295 |
| Davenport v. Hanbury | 307 | d. Jersey v. Smith | 43 |
| v. Oldis | 145 | d. King v. Frost | 120 |
| Davidson v. Foley | 162 | d. v. Lawton | 82 |
| v. Proctor | 226 | d. Leicester v. Biggs | 175 |
| Davies ex-p. | 121 | d. Lifford v. Sparrow | 202 |
| v. Davies | 383 | d. Lindsey v. Calyear | 299 |
| v. Thorn's | 226 | d. Littlewood v. Green .. 134, 200 | |
| Day v. Earl of Coventry | 41 | d. v. Nasmyth v. Knowles .. 291 | |
| v. Trig | 43 | d. Player v. Nichols | 176 |
| Deane v. Test | 336 | v. Porter | 362 |
| De Beauvoir v. De Beauvoir | 303 | d. Shelley v. Edlin .. 179, 418 | |
| De Costa v. De Pas | 411 | d. Spearing v. Buckland .. 63 | |
| Deerhurst (Lord) v. Duke of St. | | d. Stewart v. Sheffield | 418 |
| Albans | 380 | d. Toone v. Copestake | 407 |
| Deffis v. Goldschmidt | 293 | v. Wainwright | 193 |
| Denn d. Wilkins v. Kemeys | 43 | d. Westlake v. Westlake .. 49, 50 | |
| Devisme v. Mello | 288 | d. White v. Simpson | 177 |
| Dickin v. Edwards | 334 | d. Wilkins v. Kennedys | 372 |
| Dickson's Trust | 268 | Domesthorpe v. Porter | 235 |
| Doe d. Angell v. Angell | 300 | Dommett v. Bedford | 280 |
| v. Berkhead | 196 | Door v. Geary | 56 |
| d. Borwell v. Abey | 203 | Douglas v. Andrews | 196 |
| d. Calkin v. Tompkinson .. 137 | | v. Congreve | 97 |
| d. Chichester | 250 | Dowling v. Hudson | 240 |
| d. Cholmondeley v. Weather- | | Dowsett v. Sweet | 46, 49 |
| ly | 62 | Dowson v. Bell | 247 |
| d. Claridge | 179 | Drant v. Vance | 64 |
| d. Clarke | 82 | Drummond v. Drummond | 250 |
| | | Drybutter v. Hodges | 4 |

| | | | |
|----------------------------------|--|---|----------|
| Dudman v. Sheriff..... | 340 | Garth v. Meyrick..... | 46 |
| Dunk v. Fenner..... | 94 | Gay v. Sharp..... | 351 |
| E. | | General Lying in Hospital v. Knight..... | 47 |
| Eastman v. Baker..... | 302 | Genery v. Fitzgerald..... | 348 |
| Eddels v. Johnson..... | 357 | Gibbons v. Eyden..... | 345 |
| Edge v. Salisbury..... | 225 | v. Langdon..... | 197 |
| Edmunds v. Fessey..... | 315 | Gibbs v. Tait..... | 44, 371 |
| Edwards v. Symonds..... | 199, 255 | Gibson v. Bath..... | 344 |
| Elliott v. Davenport..... | 423 | v. Bott..... | 157 |
| Ellis v. Walker..... | 332 | Gilbert v. Gilbert..... | 340 |
| Elmeslay v. Young..... | 319 | v. Witty..... | 144 |
| Elwes v. Canston..... | 339 | Giles v. Giles..... | 57 |
| Ennis v. Smith..... | 329 | Gill v. Shelley..... | 315 |
| Enohin v. Wylie..... | 10 | Gillet v. Grove..... | 45 |
| Evans v. Cockeran..... | 33, 232 | Gillman v. Daunt..... | 289 |
| v. Salt..... | 303 | Girdleston v. Doe..... | 39 |
| Evers v. Challis..... | 141 | Glanvil v. Glanvil..... | 256 |
| Eyre v. Marsden..... | 196 | Glenorchy (Lord) v. Earl of, Sussex..... | 98 |
| F. | | Glover v. Monckton..... | 178 |
| Fairfield v. Morgan..... | 168 | Godfrey v. Godfrey..... | 215 |
| Fenwick v. Potts..... | 178 | Goodinge v. Goodinge..... | 225 |
| Ferguson v. Dunbar..... | 191, 204 | Gordon v. Duff..... | 340 |
| Finch v. Hollingsworth..... | 323 | Gossage v. Taylor..... | 98 |
| Finlason v. Tatlock..... | 425 | Gotch v. Foster..... | 258 |
| Fisher v. Hepburn..... | 349 | Gould v. Kemp..... | 137 |
| Fletcher v. Ashburner..... | 163 | Grace Marshall's Case..... | 44, 370 |
| Flint v. Hughes..... | 370 | Grafftay v. Humpage..... | 307 |
| Flood's Case..... | 395, 401 | Grant v. Grant..... | 310 |
| Foley v. Foley..... | 286 | Grave v. Lord Salisbury..... | 366 |
| Fondrin v. Gowdey..... | 399 | Graves v. Graves..... | 215, 217 |
| Fontaine v. Tyler..... | 337 | Gray v. Garman..... | 305 |
| Ford v. Fowler..... | 221 | Green v. Belchem..... | 90 |
| Forth v. Chapman..... | 35, 39, 94, 119, 127, 233, 303, 309 | v. Marsden..... | 224 |
| Foster's Case..... | 188 | v. Stephens..... | 110, 146 |
| Fowler v. Garlike..... | 227 | Greenwood v. Greenwood..... | 351 |
| Fox v. Fox..... | 223 | Greer v. Armstead..... | 82 |
| Frank v. Stovin..... | 309 | Gregory v. Henderson..... | 176 |
| Freakley v. Fox..... | 367 | v. Wilson..... | 285 |
| French v. Caddell..... | 120, 124 | Greville v. Browne..... | 241 |
| Frewen v. Rolfe..... | 131 | Grey v. Pearson..... | 28, 35 |
| G. | | Grievesson v. Kirsopp..... | 156 |
| Garth v. Sir John Hind Cotton... | 139 | Griffiths v. Vere..... | 386 |
| | | Gundry v. Pinniger..... | 320 |
| | | Gwynne v. Murdock..... | 304 |

| H. | | |
|-------------------------------------|-----|------------------------------------|
| Haberston v. Vardon..... | 415 | Horwood v. West..... 224 |
| Haddesley v. Adams..... | 199 | Houston v. Hughes..... 181 |
| Hagger v. Payne..... | 291 | Howarth v. Dewell..... 222 |
| Haley v. Bannister..... | 387 | v. Mills..... 415 |
| Hall v. Hill..... | 367 | Howe v. Earl of Dartmouth, |
| Halloway v. Halloway..... | 322 | 158, 338, 340 |
| Hambledon v. Hambledon..... | 373 | Howse v. Chapman..... 390 |
| Hames v. Hames..... | 307 | Hoy v. Master..... 220 |
| Hammond v. Neame..... | 222 | Howarth v. Dewell..... 221 |
| Harding v. Glyn..... 213, 217, | | Huffan v. Hubbard..... 201 |
| 220, 225 | | Hughes v. Turner..... 58 |
| Harland v. Trigg..... 222, 225, 318 | | Hulme v. Tenant..... 287 |
| Harman v. Dickenson..... | 170 | Hume v. Edwards..... 334 |
| Harnes v. Herring..... | 256 | Hurst v. Beach..... 351, 352 |
| Harris, <i>Re</i> | 227 | Hutcheson v. Hammond..... 164 |
| v. Barnes..... | 398 | Hutton v. Simpson..... 93 |
| v. Davis..... | 302 | Huxtep v. Brooman..... 62 |
| Harrison v. Lloyd..... | 292 | |
| Harton v. Harton..... 177, 178 | | I |
| Hartop's Case..... | 160 | Iredell v. Iredell..... 295 |
| Hartshorne v. Nicholson..... | 409 | |
| Hastead v. Searle..... | 43 | J. |
| Hatfield v. Thorp..... | 400 | Jackson v. Noble..... 416 |
| Hawkins v. Luscombe..... | 178 | Jacques v. Chambers..... 338 |
| Haydon v. Willshere..... | 307 | James v. Lord Wynford..... 257 |
| Hays d. Foorde v. Foorde..... | 95 | v. Richardson..... 299 |
| Hayter v. Tucker..... | 397 | v. Smith..... 314 |
| Heardson v. Williamson..... | 181 | Jenkins v. Lord Clinton..... 81 |
| Hearn v. Baker..... | 193 | Jennings v. Newman..... 318 |
| Heath v. Weston..... | 328 | Jerningham v. Herbert..... 11 |
| Heathe v. Heathe..... | 288 | Jervoise v. Duke of Northum- |
| Heneage v. Lord Andover..... | 90 | berland..... 99 |
| Hennell v. Whittaker..... | 240 | Jobson's Case..... 33 |
| Hensman v. Fryer..... 357, 359 | | Joel v. Mills..... 217 |
| Herrick v. Franklin..... 107, 303 | | Johnson v. Rowlands..... 221 |
| v. Giffard..... | 94 | v. Swan..... 398 |
| Hinxman v. Poynder..... | 221 | Jones d. Henry v. Hancock..... 44 |
| Hobson v. Blackburn..... 44, 371 | | (Lady) v. Lord Say & Sele..... 97 |
| Holdich v. Holdich..... | 244 | v. Newman..... 50 |
| Holmes v. Custance..... | 46 | v. Nicholay..... 6 |
| v. Meynell..... | 144 | v. Tucker..... 52 |
| Hood v. Oglander..... | 215 | v. Williams..... 401 |
| Hooley v. Hatton..... | 350 | Jubber v. Jubber..... 44, 227, 372 |
| Hopewell v. Ackland..... | 61 | |
| Horwood v. Griffith..... | 51 | K. |
| | | Keiley v. Fowler..... 127 |

| | | | |
|-----------------------------------|----------|-------------------------------|-----------------|
| Mountain v. Bennett..... | 54 | Pearce v. Loman..... | 259, 260 |
| Mullins v. Smith..... | 330 | Pearman v. Levis..... | 357 |
| Murray v. Jones..... | 415 | Peck v. Halsey..... | 44, 370 |
| Musgrave v. Down..... | 4 | Perrin v. Blake..... | 32, 86, 95, 104 |
| N. | | Peyton v. Bury..... | 256 |
| Napier v. Napier..... | 207 | Phene's Trusts..... | 296 |
| Nash v. Nash..... | 96 | Phillips v. Chamberlayne..... | 56 |
| Neuthway v. Ham..... | 46, 374 | v. Phillips..... | 163, 423 |
| Nevill v. Nevill..... | 224 | Phippard v. Mansfield..... | 146 |
| Newburgh v. Newburgh..... | 57 | Pickering v. Pickering..... | 338 |
| Newman v. Newman..... | 380 | v. Lord Stamford... .. | 247 |
| Nichols v. Hooper..... | 122, 123 | Pierson v. Garnet..... | 221, 225 |
| v. Savage..... | 319 | Pitt v. Jackson..... | 26, 383 |
| Nisbett v. Murray..... | 339 | Platt v. Powles..... | 101 |
| Noel v. Henley (Lord)..... | 206 | Plunkett v. Lewis..... | 366 |
| v. Hoy..... | 63 | Poad v. Watson..... | 178 |
| Nowlan v. Neligan..... | 221 | Poole v. Poole..... | 366 |
| O. | | Poor v. Miall..... | 397 |
| Oddie v. Woodford..... | 300 | Pope v. Whitcombe..... | 225, 322 |
| Ommaney v. Butcher..... | 407 | Porter's Case..... | 410 |
| Oppenheim v. Henry..... | 289 | Trust, <i>In re</i> | 305 |
| Orton's Trust, <i>In re</i> | 310 | Powell v. Davies..... | 45 |
| Ouseley v. Anstruther..... | 58 | v. Howells..... | 149 |
| Oxford (Earl of) v. Lady Rodney | 231 | Powys v. Mansfield..... | 367 |
| (University of) v. Clif- | | Prestwidge v. Groombridge.... | 45 |
| ton..... | 308 | Prevost v. Clarke .. | 221 |
| P. | | Price v. Warren..... | 369 |
| Page v. Page..... | 417 | Pridie v. Field..... | 328 |
| Pain v. Benson..... | 195 | Proctor v. Bishop of Bath and | |
| Palin v. Hills..... | 306 | Wells..... | 381 |
| Palmer v. Newell..... | 209 | Promise v. Abingdon..... | 359 |
| v. Simmonds..... | 224 | Provis v. Rowe..... | 186 |
| Palsford v. Hunter..... | 336 | Prowse v. Abingdon..... | 259 |
| Papillon v. Voice..... | 97 | Purse v. Snaplin..... | 335 |
| Parker v. Bolton..... | 221 | Pym v. Lockyer..... | 365 |
| Parsons v. Baker..... | 222 | Pyot v. Pyot..... | 322 |
| v. Parsons..... | 46 | R. | |
| Pattison v. Pattison..... | 361 | Ranke v. Hard..... | 223 |
| Paul v. Compton..... | 292 | Reed v. Denaynes..... | 188 |
| Payne <i>ex p</i> | 227 | Remnant v. Hood..... | 259 |
| Pearce v. Edmeades . | 150 | Reynolds v. Torin..... | 247 |
| | | Rhodes v. Rudge..... | 240 |
| | | Rich v. Cockell..... | 253 |
| | | Richards v. Richards..... | 336 |
| | | Richardson v. Chapman..... | 220 |

| | | | |
|--|-----|--------------------------------|-------------|
| Richardson v. Spraag..... | 38 | Shallcross v. Finder..... | 33, 241 |
| v. Watson..... | 44 | Shaw <i>ex p.</i> | 187 |
| Richmond's (Duke of) Case.... | 146 | Shelley's Case..... | 96, 99, 309 |
| Ricket's Trust, <i>In re</i> | 46 | Shepherd v. Ingram..... | 295 |
| Rickett v. Gillermard..... | 196 | Shewell v. Dwaris..... | 286 |
| Ricroft v. Christy..... | 286 | Sibthorp v. Moxton..... | 423 |
| Ride v. Attricks..... | 369 | Sidebotham v. Watson..... | 332 |
| Ridges v. Morrison..... | 350 | Sidney v. Shelley..... | 162 |
| Ridgway v. Munkittrick...319, | 324 | Silk v. Prime..... | 179, 353 |
| Ringrose v. Bramhan..... | 291 | Simson v. Smith..... | 312 |
| Rishton v. Cobb..... | 56 | Singleton v. Gilbert..... | 290 |
| Roadley v. Dixon..... | 247 | Skerratt v. Oakley..... | 172 |
| Roberts v. Walker..... | 244 | Skey v. Barnes..... | 148 |
| Robinson v. Addison..... | 335 | Slade v. Parr..... | 193 |
| v. Hardcastle..... | 311 | Small v. Wing..... | 90 |
| v. London Hospital.. | 399 | Smith v. Campbell..... | 321 |
| Rochford v. Fitzmaurice..... | 389 | v. Claxton..... | 164 |
| v. Hackman..... | 99 | v. Coney..... | 46 |
| Roe d. Dodson v. Green.... | 309 | v. Death..... | 227 |
| d. Penwarden v. Gilbert... | 62 | v. Lidiard..... | 310 |
| d. Pye v. Bird..... | 182 | v. Oakes..... | 170 |
| d. Sheers v. Jefferey122, 124, | 202 | v. Osborne..... | 150, 194 |
| d. Thong v. Bedford..... | 97 | v. Palmer..... | 305 |
| d. Walker..... | 59 | Soresby v. Hollins..... | 397 |
| Rogers <i>ex p.</i> | 294 | South v. Williams..... | 423 |
| Rooke v. Rooke..... | 61 | Southern v. Wallaston..... | 263 |
| Roper v. Radcliffe.... | 160 | Spink v. Lewis..... | 319 |
| Rose v. Bartlett.....63, | 182 | Sproude v. Prior..... | 359 |
| Ross, <i>In re</i> | 326 | Stackhouse v. Barnston..... | 351 |
| Routledge v. Dorril..... | 26 | Stafford v. Buckley..... | 94 |
| Russell v. Kellett..... | 409 | St. Albans (Duke of), v. Beau- | |
| | | clerk..... | 352 |
| | | Standen v. Standen..... | 46, 374 |
| | | Staners v. Barnard..... | 312 |
| | | Stanley v. Lennard..... | 126 |
| | | Stevens v. Hale..... | 302 |
| | | v. James..... | 278 |
| | | v. Snelling..... | 42 |
| | | Stevenson v. Dowson..... | 333, 336 |
| | | Stewart v. Garnet..... | 82, 89 |
| | | Stocks v. Dodsley..... | 306 |
| | | Stokes v. Heron..... | 91 |
| | | Stratton v. Best..... | 132, 135 |
| | | Straus v. Goldsmid..... | 411 |
| | | Stretch v. Walkers..... | 262 |
| | | Stringer v. Gardiner..... | 46 |
| | | Strode v. Lady Falkland..... | 373 |
| S. | | | |
| Sabine v. Goate..... | 4 | | |
| Sale v. Moore.....220, | 222 | | |
| Salisbury v. Denton..... | 221 | | |
| Sanderson's Trusts, <i>In re</i> | 224 | | |
| Sandford v. Irby..... | 174 | | |
| Saunders v. Low..... | 171 | | |
| Savery v. Dyer..... | 91 | | |
| Sayer v. Sayer..... | 338 | | |
| Scott v. Key..... | 215 | | |
| v. Lord Scarborough.... | 290 | | |
| Seale v. Seale..... | 99 | | |
| Shallard v. Baker..... | 82 | | |
| Shaftesbury v. Duke of Marl- | | | |
| borough..... | 239 | | |

| | | | |
|----------------------------|--------------|--------------------------|----------|
| Strong v. Teatt | 62 | Vaughan v. Burslem | 153 |
| Stubbs v. Sargon..... | 45, 227 | Venables v. Morris | 180 |
| Suisse v. Lowther | 350 | Vernon v. Vernon | 221 |
| Surman v. Surman | 44, 371, 372 | Vezey v. Jamson..... | 407 |
| Surtees v. Perkins | 358 | Viver v. Francis..... | 288, 340 |
| Sweeting v. Sweeting | 186 | | |
| Sykes v. Sykes | 349 | | |

W.

| | | | | |
|-----------------------------------|----------|-----------------------------------|----------|-----|
| T. | | Wainwright v. Wainwright.... | | 171 |
| Tarback v. Tarback | 416 | Waite v. Webb..... | | 397 |
| Target v. Gaunt..... | 129 | Walker v. Mackie | | 171 |
| Tatham v. Drummond | 399 | Waller v. Childs..... | | 405 |
| Taylor v. Martindale..... | 337 | Walsh v. Acton | | 226 |
| v. Plaine..... | 183 | Ware v. Rowland..... | | 322 |
| v. Webb | 43, 370 | Watson v. Pearson..... | | 176 |
| Tee v. Farris | 55 | Weakley d. Knight v. Rugg.... | | 293 |
| Thelluson v. Woodford | 304 | Webb v. Wools..... | | 222 |
| Themmines v. De Bouneval.... | 413 | Webb's Case | 45, 373 | |
| Thomas v. Phels | 63 | Webster v. Hale..... | | 334 |
| Thompson v. Browne..... | 5 | Weedon v. Fell | | 202 |
| v. Hudson | 285 | West, <i>ex p.</i> | 195, 204 | |
| v. Lady Hawley | 61 | v. Shuttleworth..... | 411, 413 | |
| Thornton v. Hawley | 157 | White v. Baker..... | | 202 |
| Thorp v. Owen | 223, 227 | Wilde v. Holtzmeier. | | 18 |
| Thynne v. Lord Glengall | 363 | Wild's Case..... | | 36 |
| Tibbets v. Tibbets | 223 | Wilkinson v. Adams..... | 314, 315 | |
| Tiffin v. Longman | 320 | Williams v. Ashton | | 320 |
| Tilly v. Collyer..... | 172 | v. Corbet..... | | 223 |
| Townsend v. Martin | 333 | v. Jones | | 320 |
| Townson v. Tickell | 259 | Wills v. Palmer | 299, 300 | |
| Trafford v. Ashton | 90 | Wilson v. Andrey | | 190 |
| Trenimer v. Bayne..... | 186 | v. Bell..... | | 209 |
| Trevanion v. Vivian..... | 347 | v. Dunsany..... | | 359 |
| Trimlestown (Lord) v. D'Alton. 55 | | v. Halliley..... | 90, 211 | |
| Trinder v. Trinder..... | 335 | v. Madison..... | | 91 |
| Trotter v. Oswald..... | 27 | v. Squire | | 51 |
| Trower v. Butts | 311 | v. O'Leary | | 351 |
| Tuck v. Frenchaw..... | 41 | Winch v. Brutton..... | | 222 |
| Twisden v. Twisden | 366 | Winchclyfe v. Westwood | | 306 |
| U. | | Winter v. Perratt..... | | 299 |
| Underwood v. Wing | 423 | Withy v. Mangles..... | | 320 |
| V. | | Wood v. Baron..... | | 314 |
| Vanderplank v. King..... | 145 | v. Cox | | 228 |
| | | v. Ingersoll | | 373 |
| | | Woodcock v. Woodcock..... | | 271 |
| | | Woodgate v. Unwin...132, 133, 135 | | |
| | | Woodham v. Maverick..... | | 88 |

| | | | |
|---------------------------------------|-----------------------|------------------------------------|-----|
| Woodhouse <i>v.</i> Meredith..... | 61, 183 | Wrightson <i>v.</i> Macauley | 300 |
| Woodhouslee(Lord) <i>v.</i> Dalrymple | 315 | Wykham <i>v.</i> Wykham | 177 |
| Woods <i>v.</i> Woods | 222 | Wylie <i>v.</i> Wylie | 28 |
| Woollam <i>v.</i> Kenworthy..... | 60 | Wynne <i>v.</i> Hawkins..... | 224 |
| Worldidge <i>v.</i> Churchill..... | 196 | Wyth <i>v.</i> Blackman..... | 318 |
| Wright <i>v.</i> Atkins..... | 217, 225, 228, 318 | Wythe <i>v.</i> Henniker.. | 232 |

CHAPTER I.

NATURE AND INCIDENTS OF WILLS.

§ 1. *Relations of American to English testamentary law.*

A BRIEF account of the relations of American testamentary law in general, to the common; statute, and case law of England, seems necessary for the completeness of a sketch of the rules relating to the construction of wills.

The English colonists brought here with them the English law.¹ The Congress of 1774 proclaimed this doctrine, and it has not been since disputed. Conquest or revolution, indeed, does not necessarily imply that the old law continues. However, since the American revolution and the declaration of independence by the United States, the common law, as far as it is not inconsistent with our political constitution and circumstances, has been expressly adopted by Massachusetts, New York, New Jersey, and Maryland. It has also been recognized by the courts of the other States.² The old public general statutes of England are also deemed parts of the common law of the several States.

The constitution of New York, of 1777, declared that the law of the colony, as it existed on the nineteenth of April, 1775, should continue to be the law of

¹ Calvin's case, 7 Co. 17; Commonwealth v. Leach, 1 Mass. 60; 2 *Id.* 534.

² Kent's Comm. vol. I, 472, 473, notes.

the State. The law of England, as it was prior to the fourth year of James the First, so far as it was of a general nature, was adopted by Virginia, Ohio, and Arkansas. In Illinois, Indiana, and Missouri, the same recognition was made, with the exception of the usury laws. The common and general *statuté* laws of England, down to 1776, were also adopted in Mississippi and Georgia. Vermont, likewise, has recognized the laws of England as they were in 1760. Rhode Island has adopted the English written and unwritten law down to 5 Anne, chapter 6. New Jersey has also adopted the bulk of the English law. The civil code of Louisiana¹ has repealed the French, Spanish and Roman laws, but not its own common law, or the *rationes judicandi* in force when Louisiana was ceded to the United States.² The district court of that State has equitable powers, and is bound by the rules of the English Chancery. Several of the leading English statutes, too, have been expressly adopted by several of the State legislatures. The provisions of the Statute of Frauds, especially, have been re-enacted in almost all of the States.³

The common law is no essential part of federal jurisprudence.⁴ But, as various State laws relating to person and property are rules of decision for the federal courts,⁵ a large portion of the English common law is thus indirectly imported into federal law. The Constitution, laws, and decisions of the American Union, however, form its essential jurisprudence.

¹ Art. 3, § 21.

² *Reynolds v. Swan*, 13 Louisiana Rep. 193; *Gaines v. Rolt*, 15 Peters' U. S. 9.

³ *Greenleaf on Ev.* vol. I, § 26, 2 b.; 29, c. 2, e. 3; 4 *Kent's Comm.* 95, note b., 4th ed.; see *Browne on Statute of Frauds*, App. pp. 501-532.

⁴ *Wheaton v. Donaldson*, 8 Peters' U. S. 658.

⁵ 10 *Wheaton*, 109.

It is hardly necessary to add that no statute passed in England since the declaration of the independence of the United States, has, of itself, any authority here. But, as many of such acts are merely declaratory of the civil or common law, it follows that at least, when they profess to be so declaratory, they are of weight with our tribunals. Decisions by the English courts *in pari materia* have also very great weight here, especially where the case has gone through an appellate course. With the exception of the points noticed in chapter 2, § 1, there is hardly any appreciable difference between the testamentary codes of the two countries, as regards rules of construction. Our courts, however, as is stated in the author's edition of Sir James Wigram's treatise, admit parol evidence more freely than is done in England. Still, as the American rules of construction, or of internal, as distinguished from external evidence, are so similar to the analogous British rules, there is ground to hope that the following work will be of use even to the English practitioner, in giving him, in a condensed form, the pith of our leading rules and decisions in testamentary law.

The statutes of most of the American States require wills to be in writing. Besides, the chief provisions in the last English Wills Consolidation Act¹ are either copied from previous American enactments, or have been since adopted in several of the States. The law of England, as settled by that statute, is thus a fair sample of our average testamentary law. Accordingly, the cases—and they are legion—decided under that act, will most probably be found to hold out almost unerring lights on any paths not yet traversed by American adjudication. The following treatise, however, has been intended to give, or refer to, only the more important of the English decisions.

¹ 1 Vict. c. 26.

§ 2. *A will defined and explained.*

A will may be defined to be a legal revocable disposition of one's property, to take effect from his death.¹

Such an instrument may be couched in any form or language, provided that its whole operation is postponed until the death of the grantor. In one case there was both a consideration for the grant, and words of immediate transfer, yet the instrument was held to be testamentary.²

The general criteria of a will, however, are that it is voluntary and not of operation until after the death of the grantor. Yet, a deed to trustees to the use of the grantor, A, for life, remainder to the use of B, with power of revocation to A, is not a will but a deed, and is not subject to probate or legacy duty. The test appears to be the passing of any interest legal or equitable during the grantor's life. If such interest pass, though it be but a bare seisin to uses, the instrument is not testamentary. Parol evidence is admissible to show the *res gestæ* and the intention of the testator as to whether the document was to be testamentary.³

Where no statute requires a will to be in writing or to be executed with any formality, probate will be given to any testamentary act, even to receipts for stock, bills endorsed "for A, B,"⁴ assignments of bonds,⁵ letters,⁶ marriage articles,⁷ and deeds,⁸ or promissory notes,⁹ of a testamentary and revocable

¹ See *Langdon v. Astor*, 16 N. Y. (2 Smith), 9, 49.

² See 4 Hawks, 141.

³ *Harrington v. Bradford*, Walker, 520.

⁴ *Sabine v. Goate*, 2 Hagg. 247.

⁵ *Musgrave v. Down*, cited in 2 Hagg. 247.

⁶ *Drybutter v. Hodges*, Id. 247.

⁷ *In re Knight*, 2 Hagg. 554.

⁸ Id.

⁹ 1 Maxee v. Shute, cited in 2 Hagg. 247.

nature. It is, however, sometimes exceedingly difficult to determine whether the instrument or act propounded is testamentary, where there is no local statute regulating the execution of wills.¹

In the United States as well as in England the testamentary character of a document depends on its substance and not on its form,² except so far as that depends on statute.³ In analogy to the cases just referred to, a Scottish deed of disposition and settlement and a letter⁴ have been admitted to probate here. Even a joint or conditional will is valid in the United States though, *semble*, not in England.⁵

Husband and wife may, under a power, make a joint will which is not revocable by either separately. An instrument intended to be a joint will by any other two is sometimes enforced in equity as a mutual contract.⁶ When it is thus enforceable, it is not voluntary, and consequently does not operate as a will properly so called.

A republication of a will by a codicil makes after acquired lands to pass in those States where a will of land speaks from the date of execution. For, a will and codicils thereto are to be construed together as one instrument.⁷ A like rule prevails in respect to a will and documents incorporated therewith by reference.⁸ Legacies adeemed or satisfied, however, are not revived by a re-execution of the will with codicils.⁹

¹ *Thompson v. Browne*, 3 My. & K. 32.

² *Carle v. Underhill*, 3 Bradf. 101.

³ *Matter of Easton*, 6 Paige, 183.

⁴ *Morrell v. Dickey*, 1 Johns. Ch. 153.

⁵ *Ex p. Day*, 1 Bradf., 476.

⁶ *Dufour v. Pereira*, 1 Dick. 419.

⁷ *Westcott v. Cady*, 5 Johns. Ch. 343.

⁸ *Jackson v. Babcock*, 12 Johns. 389.

⁹ *Langdon v. Astor*, 16 N. Y. (2 Smith) 9.

§ 3. *Revocation.*

A will or codicil is not necessarily a revocation of a prior will,¹ and if the codicil is expressed to alter the will in one particular, the presumption is that it confirms and republishes the rest of the will.²

A will that expressly revokes all former wills, or that disposes of all the testator's property, acts as a revocation of all former wills.³ Otherwise, the second will is only a revocation *pro tanto*.⁴ As to implied revocation by marriage, see 2 New York Rev. Stat. 64, § 43. A contract to sell does not revoke a devise.⁵ A change in the testator's property by transfer operates as a revocation of the will only *pro tanto*;⁶ and a codicil only revokes a will so far as such revocation is absolutely necessary to give effect to the dispositions in the codicil. In other words, the presumption is against a revocation.⁷

By the New York Revised Statutes, if a will disposes of the whole estate, marriage and the birth of a child revoke the will, if either the wife or child survive the testator. Parol evidence is not admissible to rebut this presumption. But such evidence is admissible in those States which contain no statutory provision, expressly or impliedly, to the contrary.

In Pennsylvania⁸ and Delaware, marriage or an

¹ See *Jones v. Nicholay*, 2 Eng. L. & Eq. 591.

² *Quincy v. Rogers*, 9 Cush. 291; *Payn v. Payn*, 18 Cal. 291.

³ *Simmons v. Simmons*, 26 Barb. 68.

⁴ *Brant v. Wilson*, 8 Cow. 56.

⁵ *Knight v. Weatherwax*, 7 Paige, 182.

⁶ *Vandemark v. Vandemark*, 26 Barb. 416.

⁷ *Kane v. Astor*, 5 Sandf. 457; *Westcott v. Cady*, 5 Johns. Ch. 343; *Wright v. Method. Epis. Church*, 1 Hoffm. Ch. 222; See *Howland v. Union Theolog. Seminary*, 5 N. Y. (1 Seld.) 193.

⁸ *Tomlinson v. Tomlinson*, 1 Ashm. 224.

after-child not provided for, is a revocation *pro tanto* only. In Ohio, Indiana, Illinois, and Connecticut, the birth of a child avoids the will *in toto*.¹

The will of a *feme-sole* is revoked by marriage. A devise is revoked by a sale of the land: all other specific gifts are revoked if the subject matter is assigned.²

By the statute laws of Maine, Vermont, New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Ohio, and Alabama, a posthumous child, and, in all of these States, except Delaware and Alabama, children born after the making of the will, and in the lifetime of the father, will inherit as if he had died intestate, unless the will comprises some provision for them, or they are particularly referred to in it.³ The will is thus revoked *pro tanto*. The statute law in Maine, New Hampshire,⁴ Massachusetts, and Rhode Island, goes further, and gives the same relief to all children and their legal representatives who have not been provided for in the will or previously advanced; unless the omission in the will appears to have been intentional. In Virginia and Kentucky, the birth of a child after the will, if there were none previously, revokes the will, unless the child dies unmarried or an infant. If the testator had children previously, the birth operates as a revocation *pro tanto*. In Virginia a will is also revoked by marriage.⁵

¹ See *Coates v. Hughes*, 3 Binney, 498; 4 Kent's Comm. 526, note. Statutes of Ohio, 1831, p. 243; Statutes of Conn. 1821, p. 200; Statutes of Ill. 1829; Statutes of Indiana, 1821; Digest of Rhode Island, Statutes, 1798, p. 282, 6 Haris. & Johns. 54; New York Rev. Stat. vol. II, 66, § 52; Mass. Rev. Stat. 1836, part. 2, tit. 3, c. 62.

² See *Infra*, chapter 24, § 3, on "the ademption of specific legacies."

³ 4 Kent's Comm. 525.

⁴ *Gage v. Gage*, 9 Foster, 533.

⁵ Rev. Stat. 1849, tit. 33, ch. 122, § 4; 4 Kent's Comm. 526.

In *Marston v. Roe*,¹ it was held that a will making no provision for the future birth of a child, although it did for a future wife, was revoked by the birth of a child, and parol evidence was not admitted to rebut this presumption.

By the New York Revised Statutes, if the whole estate is disposed of by the will, it is revoked by marriage and the birth of a child, if the wife or child be living at the time of the testator's death, unless the issue be previously provided for.

§ 4. *Conflict of testamentary laws.—What law prevails?*

Wills of personalty were not in England required to be in writing until 1838.² By that act, wills of personalty are required to be written and executed with the same formalities as wills of land. Similar uniform rules likewise prevail in most of the United States.

A will operates according to the laws in force at the time of the testator's decease, and not at the time of making the will.³ Statutes prescribing the effect of wills, however, should not be construed to have a retrospective effect⁴ unless this is expressly provided for in the enactment. A statute enacted between the date of the will and that of the testator's death may also indirectly operate on the will.⁵ *Aliter* in New York if the testator's death occurred before the passing of the Revised Statutes.⁶ In *Thomson v. Livingston*⁷ a will, which took

¹ 8 Ad. & El. 14.

² 1 Vict. c. 26.

³ *Adams v. Wilbur*, 2 Sum. 266.

⁴ See *Carroll v. Carroll*, 1 How. 275.

⁵ *Sherman v. Sherman*, 3 Barb. 385.

⁶ *Price v. Brown*, 1 Bradf. 291.

⁷ 4 Sandf. 589.

effect before the passing of the Revised Statutes and created a trust with power to a son to appoint by will, was construed in conjunction with the son's appointment to be altogether but a single will as regarded the validity of the final disposal of the property according to the provisions of the Revised Statutes.

It has been decided that a testator by adding a codicil, after the Revised Statutes, republished his will and subjected its construction to the Revised Statutes.¹ These enactments do not apply to wills made previously nor to wills of testators domiciled abroad or in other States.²

Semble, a republication by codicil in England does not bring the will under the operation of an act passed after the will and before the codicil. At least such seems to be the rule of law as regards the Dower act.³

The probate of a will by the statutory courts in England or the United States is conclusive evidence that the document is testamentary. Yet, a trust may be saddled by parol on a testamentary gift obtained by fraud; and a court of law or equity may also construe the will so as to render it wholly or in part inoperative, or may deem it void as not being in conformity with the law of the testator's domicile.

Prior to the establishment of statutory courts in England and the United States, the ecclesiastical courts in England, and the analogous courts here, gave no conclusive probate of wills of realty, but only of personality. The statutory courts, however, have generally equal jurisdiction as regard both descriptions of property.

¹ *Salmon v. Stuyvesant*, 16 Wend. 321.

² *Matter of Roberts*, 8 Paige, 446.

³ See *Hawkins on Wills*, p. 272.

§ 5. *Domicile.*

Jarman¹ considers that a will of realty is construed according to the law of the country where the land is situate. But Story,² Greenleaf,³ and other writers,⁴ are of opinion that this doctrine of the *lex rei sitæ* does not apply to the construction, as distinguished from the execution, of wills. Several American authorities may be cited in favor of either position.⁵ The balance of decisions, however, is greatly in favor of Jarman's view. It would seem, in point of principle, that as a will of realty was formerly construed as a quasi-conveyance, there is much reason to contend that the domiciliary law ought not to attach to devises. But, on the other hand, as wills are of an equitable origin, and, therefore, when made abroad, are like articles or contracts entered into in a foreign country, there are at least equally strong reasons for holding that devises ought to be construed according to the law of the testator's domicile. A will is presumed to be made *in extremis* by a person in want of counsel. Why should he be presumed to know the law of the *rei sitæ* rather than that of his domicile? However, existing authority is strongly to the effect that devises are governed by the *lex rei sitæ*.⁶

Yet, in *Harrison v. Nixon*,⁷ it was held that wills are to be construed according to the laws of the testator's domicile, especially as regards personalty, unless the

¹ Vol. I, 1.² Conflict of Laws, § 479 h.³ Ev. § 671.⁴ 1 Jarm. Am. Ed. p. 3, note.⁵ See *Trotter v. Trotter*, 3 Wils. & Shaw. 407; see 1 Redfield on Wills, chap. 9, § 2.⁶ See *Lynes v. Townsend*, 33 N. Y. 558.⁷ 9 Pet.(U. S.) 483; see *Enohin v. Wylie*, 10 H. Lds. Cas. 1.

context provides to the contrary. In New York, too, the *lex domicilii* governs as to the validity and construction of wills of realty,¹ and the same points have been so decided in most of the other States.

Semble, the law of the testator's domicile will govern as to what is to be deemed real and what personal. Jarman² considers that the law of the testator's domicile governs only movables, and does not apply to leaseholds, which are not movables in the civil law. This opinion seems sound. See, however, *Jerningham v. Herbert*.³ The decision of a court of the domiciliary nation, at all events, is conclusive in a question of the validity or revocation of a will, only as regards the testator's personalty, and not his realty, situate outside of that jurisdiction.⁴

The essentials of domicile are habitation, *animo manendi*; in other words, a *permanent home*, or a home with the intention of keeping it, or of returning to it. Sometimes, where a person lives half the year in one state and half in another, it is difficult to determine the domicile. The question is one of fact for a jury.⁵

With regard to moveable property, it is distributed on intestacy according to the domiciliary law. If the testator changes his domicile after making his will, and it is invalid according to the law of his new domicile, it was formerly supposed to be avoided, except that if he resumed a domicile in the nation where the will was made it was thereby revived.⁶ But it was decided in *Exp. M'Cormick*⁷ that a foreign will of personalty,

¹ *Bloomer v. Bloomer*, 2 Bradf. 339.

² Vol. I, 3 note.

³ 4 Russ. 388.

⁴ *Bloomer v. Bloomer*, 2 Bradf. Sur. 339.

⁵ See Round on Domicile, *passim*; *Potter v. Titcomb*, 22 Maine, 300.

⁶ Story Conf. Laws, § 473; 2 Greenl. Ev. § 668.

⁷ 2 Bradf. 169; *Isham v. Gibbons*, 1 Id. 69; but see *Parsons v. Lyman*, 20 N. Y. (6 Smith), 103; *Mooltrie v. Hunt*, 23 N. Y. (9 Smith), 394.

duly executed at the testator's domicile according to the forms there required, remains valid, although he changes his domicile to a place where a different mode of execution is required.

The domicile of origin remains until changed. The domicile of a mother, *semble*, is the domicile of her children, if their father is deceased. When a domicile is once acquired, it continues until it is again actually changed. An intention to remain is necessary for a domicile of acquisition; but an intention to change is not sufficient to alter a domicile until it is actually changed. Therefore, death *en route* does not alter domicile.¹ Domicile, when acquired, is the result of a voluntary act; consequently, imprisonment abroad does not alter domicile, but a permanent residence there has this effect, even though the testator is a trader, and, as such, is protected by treaty with his native country.²

The fact of domicile is part of the *res gestæ*. Any question relating to the testator's domicile is, therefore, open to parol evidence.³

Although foreign laws are proveable as facts, yet this evidence is addressed to the court, and not to the jury. The evidence of foreign experts may be taken by the courts. If no evidence is known to them of the foreign laws being different from their own, they will presume that no such difference exists.⁴

§ 6. *Capacity to will.*

Although questions of capacity are not directly connected with rules of construction, yet, a few remarks on testamentary capacity will not be wholly irrelevant.

¹ State v. Hallett, 8 Ala. 159.

² Moore v. Budd, 4 Hagg. 346.

³ Wilson v. Terry, 9 Allen, 214.

⁴ McClellan v. Kennedy, 8 Maryland, 230.

Indeed, questions of accidental, not personal, disability, such as fraud, undue influence, as distinguished from nonage, insanity, or coverture, are indirectly connected with rules of construction, inasmuch as fraud sometimes does not extend to the whole instrument, but merely to a part thereof, and the overthrow of a part of a will often materially affects the construction of the remainder.

At common law, females at twelve and males at fourteen might dispose of personalty by will. The first English statute of wills, 32 Hen. VIII., ch. 1, § 14, required testators of realty to be of age, and the statute 34 and 35 Hen. VIII., ch. 5, incapacitated females. The 1st Vict., ch. 26, has extended the requirement of full age to all testators, male and female. A similar law now prevails in most of our States.

The day of one's birth is included in computing his legal age; therefore, as the law regards no fraction of a day in legal computation, a person born on the first of January, 1850, attains majority on the first moment of first January, 1871.

The domiciliary law governs as to testamentary capacity. In New York males of eighteen and unmarried females of sixteen may bequeath personal estate.¹ The testamentary capacity of married women, as to personality, is in effect taken away by the section referred to.² The married woman's Act of 1848 conferred no testamentary capacity, but the Act of 1849 did.³

A married woman, whose husband is not civilly dead, cannot by the law of England make a will, either of real or personal property, except of personal estate settled to her separate use, or under a power⁴ or by her

¹ Rev. Stat. 60 § 21.

² *Wadhams v. Am. Home Mission Soc.* 12 N. Y. (2 Kern.) 415.

³ *Waters v. Collen*, 2 Bradf. 354.

⁴ *Holm v. Merry*, 4 Metcalf, 492.

husband's specific permission,¹ or else as executrix. In this last capacity she can make a will, without her husband's consent, of all assets not previously collected, and so far as she takes no interest in them. A will made by her with consent of her husband is void, unless the consent be to the particular will (in the concrete) in question, and unless the husband survive her. But a will of her separate personalty, or of her realty under a power, is independent of the husband's consent or survivorship.

The laws of the different States vary much in respect to testamentary capacity.

As to wills of married women operating as executions of powers, see *Matter of Stewart*.²

An alien's will of land is voidable only, and not void until office found. Aliens, however, may make valid wills of personalty.³ Alien enemies are disqualified from doing so, unless they have a license from our government to reside here. As to the privileges of aliens, see further 2 Kent.⁴ Their rights are now greatly modified by the laws of the different States, and possibly also indirectly by conventions formed by the Federal Government with foreign nations.

At common law, testamentary capacity was destroyed by treason and felony. But this rule of the common law is now either abolished or greatly modified in most of the States.

Testamentary capacity is proved by evidence that the testator knew what he was doing, even though his general business capacity was impaired.⁵ Persons whose

¹ *Hood v. Archer*, 1 M'Cord, 225.

² 11 Paige, 398.

³ See 2 Kent, 61, 5th ed.

⁴ Comm. 70, 71, 5th ed.

⁵ *Converse v. Converse*, 21 Vermont, 168; *Kinne v. Kinne*, 9 Conn. 102; *Stewart v. Lispenard*, 26 Wendell, 255.

reason is disordered, or who are drunk, are incapacitated from making a will. But partial intoxication does not work a complete disqualification to will.¹ The burden of proof of testamentary capacity is supposed to rest on the person propounding the will. The attesting witnesses are competent to prove a want of testamentary capacity.²

The declarations of a testator are evidence of his testamentary capacity, and also of the question whether the will has been obtained from him fairly, or by undue influence. On principle, there seems to be no ground for rejecting, as regards fraud, the testator's declarations made after the date of the will more than those made before it was executed.³ On the question of capacity, see further, *Davis v. Calvert*.⁴ On a question of capacity, the contents of the will and the whole state of the testator's affairs and conduct are relevant subjects for evidence.

Various classes of persons are in England deprived by statute of rights under wills. In America no such disqualifications exist.

A devise to a witness to a will formerly avoided the will unless it had three witnesses. By the present English law,⁵ which has been adopted in most of the United States, the will is now valid, but the legacy is void. According to the old rule, if the legacy was adeemed, the witness was restored to competency in England,⁶ but not in America.⁷

¹ See *Lowe v. Williamson*, 1 Green Ch. 85, et seq.

² *Whitenach v. Stryker*, 1 Green Ch. 11.

³ See *Waterman v. Whitney*, 1 Kernan (5 N. Y.), 157; notes to Proposition Seven in Sir James Wigram's treatise.

⁴ 5 Gill and Johns. 269, 301.

⁵ Stat. 25 Geo. II. c. 2; stat. 1 Vict. c. 26.

⁶ *Windham v. Chetwynd*, 1 Burrow, 414.

⁷ *Hawes v. Humphrey*, 9 Pick, 350; *Cornwell v. Isham*, 1 Day's Rep. 35, 41, and note.

A devise to the husband or wife of a witness avoids the will, yet a devise to a child of the witness has not this effect.¹ But if the witness, as a non-resident or otherwise, is not required to establish the will, a legacy to him does not invalidate it.²

An alien friend may take a bequest, but not a devise, nor even a bequest so far as it is derivable from land. An alien enemy, or a citizen domiciled in the country of an alien enemy, cannot take either a bequest or devise. A felon, in England, forfeits to the crown all rights of action accruing to him until his term of punishment is ended; but he forfeits nothing that accrues to him afterwards. The law of forfeiture varies much in the different States.

Bequests made in the Southern States during the civil war are valid, unless tainted with a want of allegiance.³

Devises to foreign corporations are valid, unless reasons of special policy, such as the discountenancing of slavery, are in question.⁴

§ 7. *Period by reference to which a will is construed.*

A will has always been presumed in England to speak only from the death of the testator, as to personalty; but in that country before 1838, a will spoke from its date as to realty. By 1st Vict. c. 26 devises and bequests both speak only from the death of the testator, unless a contrary intention appears. The rules thus settled by this act have long been adopted in most

¹ Allen v. Allen, 2 Overt, 172.

² Cornell v. Woolley, 3 Keyes (N. Y.), 378.

³ Corbett v. Nutt, 18 Gratt, 624.

⁴ Wade v. Colonization Society, 7 S. and M. 663.

of the United States,¹ either in consequence of a statute or by construction.

The old rule as to devises of land implied that they were conveyances in certain respects. Therefore, if the testator parted with his seisin but for an instant, it operated as a revocation of a previous devise thereof.

The date of a will is perhaps the natural period with reference to which the will should be interpreted, although the operation of a will, as of a deed, doubtless can date only from its complete execution. Wills of personalty, however, and of realty in England and several of the United States, are, as already stated, presumed not to operate previously to the death of the testator.

A will is presumed, in the following States, to speak only from the date of the testator's death, as regards the subject matter (as distinguished from the objects) of the testator's bounty:—Maryland, Missouri, New York, and Pennsylvania.

In Virginia, wills of land speak from the making of the instrument, unless it discloses an intention to the contrary.² A similar law obtains in Massachusetts,³ New Hampshire,⁴ Vermont, Indiana, Maine, North Carolina, Connecticut, Illinois, and Kentucky,⁵ though a testator may in these States convey by his will any after-acquired land, provided he declares an intention to that effect.

The construction put on the will statutes of these States, however, virtually raises a presumption that wills speak only from the death of the testator,⁶ if there is nothing in the context to the contrary.

¹ See *Gold v. Judson*, 21 Conn. 616, 622.

² *Smith v. Edrington*, 8 Cranch, 66.

³ Mass. Gen. Stat. c. 92, § 4; *Prescott v. Prescott*, 7 Met. 141, 146.

⁴ *Whittemore v. Bean*, 6 N. H. 47; Rev. Stat. N. H. 1842, ch. 156,

§ 2.

⁵ See 4 Kent's Comm. 510, *et seq.* ⁶ *Cushing v. Aylwin*, 12 Met. 169.

Specific legacies usually point to the date of the will,¹ general legacies to the death of the testator.

The words "now," "now living," refer to the date of the will. But the present tense of verbs has not always this signification; therefore "all I am possessed of," or "all my debts," and similar residuary clauses, refer to the time of the testator's death.² The meaning of the word "now" will not be affected by the absence of a date to the will,³ since the date of any instrument, being part of the *res gestæ*, is open to parol evidence.⁴ In the case of *Allsouls' College v. Codrington*,⁵ a testator bequeathed a library of books, "now in the custody of B." After-bought books were held to pass. The gift was, as it were, of a class of books.

It is often exceedingly difficult to determine whether a testator intended that a particular clause in his will should speak from its making or from a future date. The words "now living," however, or the present tense of the verb used, may, as already noticed,⁶ aid the interpretation. The substance of the disposition, and the context, are the best guides in this respect. Parol evidence, of course, is wholly inadmissible. Such evidence never relates to the willing or directing function, but only to the subject or object of gift.

Specific bequests imply that the dispositions speak from the date of the making of the will. On this principle rests the doctrine of the ademption of such gifts. Jarman⁷ thinks that in those States where a will speaks from the death of the testator, a specific gift will not

¹ *Cockran v. Cockran*, 14 Sim. 248.

² *Wilde v. Holtzmeyer*, 5 Ves. 811.

³ See *contra*, *Cole v. Scott*, 16 Sim. 259.

⁴ *Deakins v. Hollis*, 7 Gill & J. 311; *Wright v. Wright*, 5 Ind. (Porter), 389. ⁵ 1 P. Wms. 597.

⁶ 1 Jarman, 278; *Wilde v. Holtzmeyer*, 5 Ves. 811.

⁷ Vol. I, 290, *et seq.*

be considered to have been adeemed if the testator has re-acquired some other property that suits the description in the will. But there is no reason whatever to suppose that the 1st Vict., c. 26, and the analogous American statutes, are intended to make any change in the law of the ademption of specific testamentary gifts, since, indeed, the doctrine of ademption applies to bequests of personalty as to which a will always spoke only from the time of the testator's death, unless the will itself provided to the contrary.

§ 18. *Interests Disposable by Will.*

The English law down to 1 Vict., c. 26, required that a testator should be seized of any land he devised. This rule still prevails in a few States.¹ But, the New York Revised Statutes² make all descendible estates devisable. The same law prevails in Massachusetts, Vermont, Pennsylvania, and Virginia. In Ohio there is the general and most salutary provision by statute, that every kind of property may be devised. The testamentary power in the United States may therefore be considered as virtually the same as, or rather more extensive than, that which exists in England. The test in the latter country is the question whether the interest is a possibility coupled with an interest. In the United States the test usually is whether the interest is descendible.

All interests, however, if vested, or executory, or consisting of rights of entry or of action, are devisable in most of the States,³ and in England since 1838. So are all possibilities coupled with an interest.⁴ Bare possibili-

¹ 4 Kent's Comm. 512.

² Vol. II. 57, § 2, 5.

³ Smithwick v. Jordan, 15 Mass. 113.

⁴ Den v. Manners, 1 Spencer, 142.

ties, however, although descendible, are not devisable in some of the States, although the common test of what is devisable is the inheritable quality of the interest in question.¹

The possibility that the estate of a certified bankrupt may be restored to him by means of a supersedeas, by an arrangement with his creditors or otherwise, is not such a possibility coupled with an interest as will enable him to transmit the estate by a general devise of present and after-acquired property.² In New York, however, a testator may devise lands in the adverse possession of another, who holds under a sheriff's sale thereof, as the property of one who had no title.³ Indeed, it would seem unsafe at the present day to hold that any interest or possibility not acquired tortiously is not devisable in any of the States, since statute law has made sad havoc upon the venerable but thorny boundaries of the common law ; and equity is bound to follow the genius of legislation.⁴

In those States where a devise of land speaks only from its date, the equitable or legal interest alone may pass, while the correlative interest, if after acquired, descends to the testator's heir. If a testator has not entered into a contract, valid either in law or equity, for land, and has no real estate, his devisee of land takes nothing, and is not entitled to have any personality applied to purchasing land⁵ in order to render the devise operative.

Terms of years and estates, *par autre vie*, limited to

¹ Jackson v. Varick, 2 Wend. 166 ; 4 Kent's Comm. 512. See Smith v. Jones, 4 Ohio, 115.

² Estate of Morris, Dist. of Pa. Crabbe, 70.

³ Waring v. Jackson, 1 Pet. 570.

⁴ See 4 Kent's Comm. 206, 207 ; Jackson v. Waldron, 13 Wend. 178, 4 Wash. C. C. 570.

⁵ 2 Williams Ex. (2d Am. ed.) 1251, 1253.

the lessee and his executors (not heirs) vest as chattels real primarily in the executor. They are devisable, like ordinary personalty, and the testamentary power over them is not embarrassed with any question of tenure or seisin. A quasi entail of land held *par autre vie*, it seems, may be barred by a deed, surrender, or articles, but not by will. There is no reason, however, why it should not be barrable by will. It does not fall under the principle of recoveries, and the fiction of a recompense to the issue. It may be barred *inter vivos* directly. Why should not the remainder man be equally barrable, and, where there is no fictitious equivalent, why should a will be deemed a conveyance inferior to articles? The law on this point does not appear to be settled in the United States. It will therefore, probably be determined finally in analogy to principle. Even in England the question cannot be considered concluded.

Estates *par autre vie*, and renewable leaseholds containing covenants for perpetual renewal are much more common in Ireland than in England or the United States. They are likely, however, to become here in the progress of society a more usual form of lease than is the case at present.

The will of a joint tenant is void, unless he survives his co-tenants. Even then it will pass only the landed interest he had at the time of making the will, if made in England before 1 Vict., c. 26, or in any of the States now where wills of realty speak from their date. As joint tenants were at common law seized *per tout* as well as *per mi*, it is strange that their will could not pass the *jus accrescendi* prospectively. Yet such was the law. At present, however, where a will speaks from the death of the testator, unless the context provides to the contrary, after-acquired interests pass by the instrument.

CHAPTER II.

GENERAL PRINCIPLES OF TESTAMENTARY CONSTRUCTION.

§ 1. *Principles of American adjudication.*

As equity bears an analogy to law in its deductions, though not in its data, so the American law of wills may be regarded as an equitable interpretation of the correlative English rules. A knowledge of these is, consequently, necessary for the practitioner here. But he should regard them as guides, and not as masters. Their philosophy and sense bind our courts, but not their occasionally technical rigidity and frequent close similarity to rules governing the construction of deeds. The American tribunals, therefore, will be guided by the English cases only as regards leading principles. The English authorities will afford grounds for presumption and rules for direction; but the least positive evidence to the contrary in a will must generally, if not, indeed, always, neutralize in America any mere rule of common-law construction.

The *general* rules relating to the construction of wills are, however, in the main, the same in the United States as in the United Kingdom. The leading exceptions appear to be—1, the rule in Shelley's case is not so strictly followed in the United States; 2, construction *cy pres* is not usually adopted in behalf of charities; and 3, *semble*, precatory trusts are not so readily enforced; while, 4, parol evidence is more freely admitted. The

last exception, however, is daily becoming more and more curtailed.¹

It is a settled rule of interpretation in the Supreme Court of the United States, as regards titles to property in the different States, to follow the statutory and unwritten laws of such States.² But, on the construction of wills, the Supreme Court takes independent ground, and may disregard the decisions of State courts.³ In *Cornish v. Wilson*,⁴ on the other hand, the court considered the case of *Fenwick v. Chapman*⁵ to be erroneous, and held that the decisions of the Supreme Court of the United States, construing the local laws of Maryland, are not conclusive authorities for the State courts.

The courts seem to take for guides in construing a will—1, decided cases; 2, rules of law; 3, rules of testamentary construction; 4, the whole text of the will; and 5, the particular passage. These are the main helps to the construction; and, though equally necessary to be considered, their relative practical force is perhaps in the order mentioned. But, as precedents rarely apply to wills drawn by laymen, and as the context predominates over common law rules of construction, it is in the grammatical sense of the whole document that the key to the difficulties of testamentary interpretation is most usually to be found.

§ 2. *Precedents.*

The first rule of testamentary construction, however, is that courts must abide by decided cases.

To these any supposed intention of the testator to

¹ *Ruston v. Ruston*, 2 Dall. 244; *State v. Nicols*, 10 Gill. & J. 27; *Inglis v. Trustees of the Sailors' Snug Harbor*, 3 Pet. U. S. 117, 118.

² *Pollard v. Dwight*, 4 Cranch, 429.

³ *Lane v. Vick*, 3 How. U. S. 464.

⁴ 6 Gill, 299.

⁵ 9 Pet. U. S. 461.

the contrary must give way. Therefore, where a long series of decisions has attached a fixed meaning to certain phrases, such meaning, and not the popular sense of the terms used, will be adopted by the court,¹ unless the context is clear to the contrary.² Precedents, however, have paramount weight in a testamentary cause only when they are strictly analogous.³

§ 3. *Rules of law.*

With respect to rules of law, such as fall properly within the scope of this work will be found discussed in the chapter on void testamentary gifts.

§ 4. *Rules of construction.*

The rules that regulate the construction of wills are almost identical with those appertaining to contracts, or executory articles, as distinguished from final conveyances. Indeed, where a legal phrase occurs in a will, it will be construed exactly as if it stood in a deed, provided that the testator does not in some other part of the will show an intention that the legal phrase is not to be understood in its technical sense. Accordingly, Sir Edward Coke says, of the relations of testamentary to common law, "I have learned this good rule, always to judge, in respect to wills, as near as may be to the rules of law."⁴

¹ *Brown v. Lyon*, 6 N. Y. (2 Seld.) 419; *Kingsland v. Rapelye*, 3 Edw. 1.

² *Bradhurst v. Bradhurst*, 1 Paige, 331; 1 Abb. N. Y. Dig. 381; *Lambert v. Paine*, 3 Cranch, 134; *Carr v. Porter*, 1 McCord, c. 71, 72; *Ide v. Ide*, 5 Mass. 501.

³ *Lyon v. Acker*, 33 Conn. 225.

⁴ 1 Bulst. 130.

Almost all rules of interpretation, not of a restrictive nature, that are applicable to deeds, equally apply to wills. For instance, the maxim that a document may be incorporated in a deed by reference, is equally applicable to a will. The manuscript referred to, so far as its contents are adopted by the will, becomes thus part and parcel thereof, and is supposed to be executed when the will itself is completed with due ceremony.

The maxim that the exclusion of one person or thing is the inclusion of another, is also often acted upon by the courts when interpreting wills. Therefore, if a younger child is excluded from a share by reason of his becoming elder before a given period, his becoming an eldest child afterwards does not deprive him of his share. A little observation applies to the converse doctrine, that the inclusion of one is the exclusion of another; and, indeed, to every rule of interpretation applicable to contracts as distinguished from conveyances at common law.

But, doctrines of tenure, and restrictive or technical rules of construction, such as the necessity for using the word "heirs" in order to pass a fee, do not apply to wills. The benignant principles used for interpreting deeds are still more liberally applied to wills. But the negative and restrictive rules that fetter the construction of the former class of instruments are not strictly enforced in respect to wills. Testamentary construction, properly so called, therefore, relates to those technical rules, which the courts, when expounding wills, do not wholly ignore, but modify; as, for instance, when they interpret the phrase "heirs of the body" to mean first and other sons taking by purchase.

A *cy pres* construction is sometimes applied to deeds, in order to exclude a false demonstration, or to impart certainty to a seemingly uncertain gift. Yet the

peculiar testamentary rule usually termed *cy pres* is inapplicable to deeds. In these instruments a fee tail can only be created by the express words "heirs of the body," or the few other phrases that have a similar legal significance.

A *cy pres* construction, indeed, is also deemed inapplicable to personalty and to estates in fee simple, though if the doctrine be rightly expounded in *Pitt v. Jackson*,¹ this limitation of its scope is contrary to analogy, if not to strict principle. This restriction of *cy pres* construction, however, as settled by decided cases, indicates the true key to the nature of testamentary limitations. They are essentially executory, or contractual, and will be construed as such, although some of the parties has an "equity," properly so called, or anything more than a strict legal right, such as that for which, if it arose under a contract, a court of law would give damages, but equity would give no specific relief. The executory character of a claim under a will, however, is not one of a definite nature, such as arises under marriage articles where the intention of the framer of the articles is undoubted. Therefore, the rule in *Shelley's case* is applied more freely under wills than under marriage articles. But the essence of the claim is still executory, so far as that the text of the will is construed by the courts just as if the document were a contract in equity.

Words are taken strongly against the grantor in a will as in a deed. Hence have sprung the rules which authorise the transposing or implying of words, and which favor the vesting and indefeasibleness of estates. The rights of the heir are only considered with extreme favor when the question arises between him and the

¹ 2 Bro. C. C. 51; *Routledge v. Dorril*, 2 Ves. Jun. 357.

residuary devisee on account of a partial failure of the testator's disposition, or else is a remote result of that disposition, as when the contest is between the heir and the next of kin under a trust to convert. Indeed, if the direction relate to personalty, the next of kin retains any portion not required for the purpose for which conversion is directed. The heir is favored only in respect to rules of law and incidents of property, but not in respect to rules of construction.

An instrument may operate as a deed in one part and as a will in another.¹ As to the distinctions between a deed and a will, see *Meek v. Holtom*.²

Nevertheless, general rules for the construction of wills, no matter how philosophically compiled these rules may be, cannot be of the same degree of use as rules for the construction of deeds. The strict demand of the law for formal conveyancing *inter vivos* produces a corresponding supply of drafts, which, as a rule, vary only within definite limits from the prescribed models. But the necessary liberality of the law in construing wills has opened the flood-gates of legal chaos; and both the religious and the secular purposes of the testator are often wholly defeated in the subsequent confusion. Yet testamentary rules are not without their uses; first, as regards all well-drawn testaments, and secondly, because such instruments, even when prepared by ignorant persons, abound with technical phrases copied from deeds. It is to be remembered, however, that in the case of every will, whether well or ill drawn, the intention of the testator, as expressed in the document, will be sought to be effectuated in a more liberal way than if the draft were one *inter vivos*.

¹ *Robinson v. Schley*, 6 Geo. 515; *Taylor v. Kelly*, 31 Ala. 59.

² 22 Geo. 491; *Babb v. Harrison*, 9 Rich. Eq. 111.

No general rule of construction, therefore, when applied to a clause in a will, is without its exception, if the context is sufficiently strong to the contrary. This is always allowable in a will, though not in a deed. General rules, therefore, general words, and particular terms, are all controlled by the guiding star of the testator's lawful intent,¹ which varies in almost every particular case. The only perfect barrier against litigation under a will is a case exactly or essentially in point. Case law is thus virtually the whole of testamentary jurisprudence.

A will, statute, or other document, is construed according to the primary sense of the words used, except where a rule of law, the context, external circumstances, or a rule of construction is inconsistent with such interpretation.²

As, then, the words in a will must, under the conditions just specified, receive their primary or grammatical import,³ an heir-at-law will not be disinherited,⁴ a common law estate will not be construed an executory devise,⁵ a vested estate will not be construed as contingent,⁶ nor will the primary liability of the personalty to debts⁷ be shifted, unless such is the manifest and undoubted intention of the testator. General legacies, too, are favored rather than specific ones.⁸

Whether an adjective in a will refers to the last substantive or not depends on the intention of the testator.

¹ *Wylie v. Wylie*, 1 De. G. F. and J. 410; s. c. 6 Jur. N.S. 259.

² *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Grey v. Pearson*, 6 H. L. Cas. N. S. 61.

³ *Annable v. Patch*, 3 Pick. 363.

⁴ *Hayden v. Stoughton*, 5 Pick. 536.

⁵ *Hawley v. Northampton*, 8 Mass. 87.

⁶ *Dingley v. Dingley*, 5 Mass. 535.

⁷ *Seaver v. Lewis*, 14 Mass. 87.

⁸ *Foote App.* 22 Pick. 302; *Briggs v. Hosford*, 22 Pick. 289.

The general rule that the reference is to the last antecedent is inapplicable to a description consisting of several particulars.¹ In such cases the reference generally qualifies the whole series.²

Punctuation may be regarded as a guide to the construction when no other means of solving an ambiguity can be found. But if itself is the source of the ambiguity, it is then unimportant,³ and will not be suffered to confuse a construction otherwise clear.

These observations apply to wills the meaning of which is sensible or applicable in several different senses to the testator's circumstances. For the rules regulating the admission of parol evidence, where the will is not in any primary sense of its terms applicable to the testator's circumstances, the reader is referred to the preceding treatise.

§ 5. *Intention.*

The intention of the testator, indeed, is often said to be the polar star to the interpretation of his will.⁴ The testator may make his glossary in the will itself, and define the terms he employs.⁵ His directions, however, it is to be remembered, cannot contravene a rule of law, as that a tenant in tail is not to have power to disentail the land, or that a tenant in fee is not to alien it. It is the legal, not the actual intention of the testator, therefore, which is the key to the construction of his will.⁶ *Lasher v. Lasher*⁷ is no authority to the contrary, as it

¹ *Hunter v. Hunter*, 17 Barb. 25, 85.

² *Ib.*

³ *Sweet v. Geisenheimer*, 3 Bradf. 114; *Arcularius v. Geisenheimer*, 3 Bradf. 64. *43 Barb. 145*

⁴ See *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Mutter's Estate*, 38 Penn. 314; 4 Kent's Comm. 535.

⁵ 4 Kent's Comm. 535, note; see 11 Moore's P. C. C. 526.

⁶ *Martindale v. Warner*, 15 Penn. 471.

⁷ 13 Barb. N. Y. 106; see *Robertson v. Johnston*, 24 Geo. 102.

applies merely to the mode of creating an estate, and not to determining its permanent incidents.¹

The lawful intent of the testator, however, as to each gift or power is, in practice, the cardinal rule for the construction of wills. To that intent, all inconsistent and incongruous expressions must yield.² But the intent is often to be inferred, not from a part of the instrument, but from the whole of it.³

The intent is to be gathered from the will only.⁴ But the whole document will be considered in its bearings upon each clause, and effect will be given to each of the dispositions unless it is entirely repugnant to some other clause.⁵ The clause which least effectuates the testator's general intention will then be expunged.⁶ If both are equally important, the latter prevails. The introductory clause is a good key to the intention, provided there is an actual clause corresponding with it.⁷ Sometimes, even without an actual disposition, the introductory clause operates as much by implication.⁸ A subsequent clause, referring to a supposed preceding provision, which, however, is not in the document, will often, too, amount to a disposing clause by implication.⁹ So, if a clause will not be reasonable unless it be supposed the testator intended to make a corresponding disposition of other portions of his property, such dispositions will be implied.¹⁰

¹ See *Stockes v. Tilly*, 1 Stockt. N. J. 130.

² *Finlay v. King*, 3 Pet. 347; *Smith v. Bell*, 6 Pet. 68; *Lane v. Vick*, 3 How. 472; *Kip v. Kip*, 2 Pa. 366; *Byrd v. Byrd*, 2 Brock, 170.

³ *Ib.*

⁴ *Jackson v. Luquere*, 5 Cow. 221.

⁵ *Arcularius v. Geisenheimer*, 3 Bradf. 64; *Sweet v. Geisenheimer*, Id. 114.

⁶ *Kane v. Astor*, 5 Sandf. 467.

⁷ *Earl v. Grim*, 1 Johns. Ch. 494.

⁸ 18 Ves. 41; *Marsh v. Hague*, 1 Edw. 174.

⁹ *Hyatt v. Pugsley*, 23 Barb. 285.

¹⁰ *Rathbone v. Dyckman*, 3 Paige, 9.

The whole instrument has frequently thus to be considered when any part is under interpretation.¹

Yet, to pass a fee, an introductory clause will not be sufficient, where the words of the conveying clause do not in their ordinary import convey such an estate.² But if the introductory clause in a will indicates an intention on the part of the testator to dispose of his whole estate, this will render a subsequent general devise a fee, if there be a connection between the two passages.³ Unless there is such connection, only a life estate passes, except where the devise itself contains adequate words, or a local statute applies to alter the rule.⁴ The old rule, however, is thus altered by statute in several of the United States, so that a general devise of land, without any words of limitation, passes the testator's whole interest. A similar rule was established in England by 1st Vict. c. 26.

The testator's intent, however, is to be gathered not merely from the words used by him, but from the words as defined by the law of the land,⁵ or of his domicile, so far as the will relates to personalty.⁶ This rule is, after all, subject to any meaning imposed on his words by the testator, either directly or by the context. The rule, however, is valuable as showing that a technically-drawn will shall be construed technically, subject only to the testator's primary intention,⁷ of which no doubt the use of technical words is itself some

¹ *Kip v. Kip*, 2 Paine, 366 ; *Stanley v. Colt*, 5 Wall, 119 ; *Gardener v. Wagner*, Baldw. 454.

² *Wright v. Page*, 10 Wheat. 204.

³ *Van Derzee v. Van Derzee*, 30 Barb. N. Y. 331.

⁴ *Beall v. Holmes*, 6 Har. & J. 205 ; *Finlay v. King*, 3 Pet. U. S. 346.

⁵ *Pennoyer v. Sheridan*, 4 Bl. C. C. 316.

⁶ *Harrison v. Nixon*, 9 Pet. 483.

⁷ *Smith v. Bell*, 6 Pet. 68.

evidence. But no part of the testament will, if possible, be held void for uncertainty,¹ or overruled by another part. *A fortiori*, an express limitation is not controlled by implications drawn from other provisions in the will, if the latter can, by any fair intendment, be reconciled with the former.²

The presumption in favor of a technical use of technical words will also be sacrificed in behalf of the general intent.³ Thus, the word inherited may be applied to lands devised or conveyed by an ancestor.⁴

On the other hand, directions merely subsidiary to the general purposes of a will can rarely, if ever, have any influence on the general construction of the document.⁵

As the rules of law will govern where the construction is silent or ambiguous, it follows that a knowledge of conveyancing is just of as much use to the testamentary lawyer as it is to the practitioner in other branches. The power of the testator to override any rule of construction is unquestioned. But testators and their draftsmen do not always know how to apply this power. The result, therefore, is not unfrequently as in *Perrin v. Blake*,⁶ that they bind themselves hand and foot to common law rules.

With the exception, however, of doctrines relating either to parol evidence or to principles of public policy, every rule of construction referred to in these pages operates only where the context is silent or doubtful on the particular point in question.

Sailors' wills are in some respects exceptions to the

¹ *Kip v. Kip*, 2 Pa. 366.

² *Ward v. Amory*, 1 Curt. 419.

³ *De Kay v. Irving*, 5 Den. 646.

⁴ *Ib.*

⁵ *McDonough v. Murdock*, 15 How. 367.

⁶ 4 Burr, 2579; 1 W. Blackst. 672.

ordinary rules and presumptions by which the real intention is to be ascertained.¹

§ 6. *Distinct gifts.*

A testator is presumed to have an additional purpose for each additional expression² and to intend such a meaning as will give most effect to the context.³ Every clause, therefore, will, if possible, be so construed as to be rendered operative itself, and to allow the other dispositions to be operative also.

The rule that every clause in a will is to have some force, if possible, is well illustrated by an express charge of a mortgage debt on the land mortgaged. This express charge makes a devisee of the mortgaged land take it subject to the mortgage.⁴ Unless the personalty was thus exonerated, the clause referred to would have no force. But a construction which alters the relative liabilities of the heir and the executor gives the charge a peculiar force, which it would not otherwise have had.

So, a direction to pay debts implies that they are charged on the land, else the clause will be inoperative.⁵

Mortgaged land is at present in England, and in some of the United States, the primary fund for payment of the mortgage debt.⁶

Part of a void will, or of a provision therein, will be upheld, if it can be separated from the unsound parts consistently with the testator's general intention.⁷ To

¹ *Sherry v. Lozier*, 1 Bradf. 437.

² *Oddie v. Woodford*, 3 Myl. & Craig, 584.

³ 2 Jarm. 62; *Jobson's Case*, Cro. Eliz. 576; *Leigh v. Leigh*, 15 Ves. 92.

⁴ *Evans v. Cockeram*, 1 Coll. 428.

⁵ *Shallcross v. Finden*, 3 Ves. 737.

⁶ See *infra*, chapter nineteen, on "Charges on Land."

⁷ *Oxley v. Lane*, 35 N. Y. 340, Ct. of App.

such primary purpose a secondary intention, if inconsistent therewith, must always yield;¹ and of two probable intentions that one will be adopted which prefers the kin of the testator to strangers.²

The courts, however, will follow judicial authority, and not conjectural interpretation, where the clauses in question are identical in language.³

§ 7. *Equitable interpretation.*

The construction of a will is in the main the same at law as in equity. The Court of Chancery has always in England supplied, under certain circumstances, a surrender to the use of a will of copyholds, and our courts of equity will here, as in England, exercise their whole machinery in aid of discovery,⁴ so that the equitable jurisdiction is indirectly larger than that of law in testamentary matters. But, unless there is some collateral equity or presumption in question, the construction of a will is essentially the same in all courts.⁵

With the exception of certain presumptions against double gifts,⁶ a court of equity has no greater latitude than a court of law in the construction of wills, or the expunging or transposing of the words thereof. This rule has not been impugned since it was laid down by Lord Hardwicke in *Duke of Marlborough v. Godolphin*.⁷ Both classes of courts, however, will transpose and even expunge words and clauses, in order to effectuate the testator's intention, as declared in other parts of the will.⁸ But the document will not be thus modified

¹ *Post v. Post*, 47 Barb. 72.

² *Downing v. Bain*, 24 Ga. 372.

³ *Myers v. Eddy*, 47 Barb. 263.

⁴ See Story Eq. Jur. 1489, 1490.

⁵ See *supra*, Part I, 46.

⁶ See *infra*, ch. 24, § 7; *supra*, Part I, notes to Proposition Seven.

⁷ 2 Ves. Sen. 74: *Luxford's Case*, 3 Lev. 125.

⁸ *Duke of Marlborough v. Godolphin*, 2 Ves. Sen. 74.

where the existing collocation of the words is clear in meaning. A like rule applies to reading the word "and" as if it were "or," and conversely. These variations of the letter of the will can only be made when the context imperatively requires such modifications, and when without them the whole meaning of the clauses in question would be hopelessly entangled.¹ But when these conditions concur, the necessary changes will be made, and the document will be interpreted equitably at law as well as in courts of equity.

Lands were not devisable at common law, but were in equity by way of use or trust. Wills of chattels, too, were expounded only by the ecclesiastical courts, which, like the Court of Chancery, were presided over by a clergyman. All wills have thus come to be construed equitably by every court, while bequests of personalty are still more liberally interpreted than devises of land. In *Forth v. Chapman*,² the same clause received a different interpretation, as regarded land from the meaning put upon the words when applied to personalty. In *Beaumont v. Fell*,³ too, an indistinct enunciation by a dying testator was considered sufficient for a bequest, though, if it were a devise, the court intimated that its opinion might be different.

§ 8. *Repugnancy.*

In order to effectuate the main intention of the testator, words in a will may not only be transposed or modified in their meaning,⁴ but may even be wholly

¹ *Mortimer v. Hartley*, 3 De G. & S. 316; 3 Eng. Law. & Eq. 532. See *Gray v. Pearson*, 6 H. Lds. Cas. N. S. 61.

² 1 P. Wms. 663.

³ 2 P. Wms. 140.

⁴ *Finlay v. King*, 3 Pet. (U. S.) 346.

rejected. The court, indeed, is expected, like a printer, to read any manuscript, or, like a reporter, to give sense to any statement, however incongruous or involved. For these so extensive functions great latitude is accorded to the judicial interpretation. For this purpose, words of purchase will operate by way of limitation, if they can have no effect in their primary sense. The word "children," too, is deemed to be a term of limitation, if those referred to are not *in esse* at the time of making the will. This is termed the rule in Wild's Case.¹

The general or primary intention of the testator is thus always sought to be effectuated, even at the sacrifice, if necessary, of his particular intention. In other words, as false demonstration will not necessarily vitiate a description of the subject or object of a devise, so an incongruous direction as to the mode of devolution will be purged of its surplusage or heterogeneous elements, and will be moulded into a shape recognised by the law. A common instance of this rule is the construction *cy pres* of an estate tail in one to whose unborn descendants successive life estates are given, some of which are void for remoteness. Jarman,² indeed, very justly observes that many of the cases supposed to be decided on the basis of the *cy pres* doctrine were merely instances where the rule in Shelley's case was applied, inasmuch as both the general and particular intentions of the testator could be observed by giving the children estates by purchase, and the ancestor an estate *in remainder* afterwards, as in Doe v. Gallini.³ The doctrine, however, is not as Jarman⁴ alleges, "one of the absurdest ever advanced,"

¹ 6 Rep. 17; see Allen v. Hoyt, 5 Met. 324; see *infra*, ch. 23, § 4.

² Vol. II, 401, *et seq.*

³ 5 Barn. & Ad. 621; s. c. 3 Ad. & El. 340.

⁴ Vol. II, 404.

when applied as a breakwater against the rule of perpetuity: neither does it seem to be always coincident with the rule that technical expressions must get their full force unless the context is plain to the contrary. The provision of 1 Rev. Stat. of New York, 748, § 1, it may be added, was not intended to extend the doctrine of *cy pres* construction.¹

§ 9. *Transposition of words.*

Words to be transposed must be not merely inoperative where they stand, but must also be inconsistent with the context. Words, however, will be more readily transposed than expunged, and will be always readily shifted, if this will be in aid of the general intention of the testator, and the words are inoperative while left intact.² Jarman thinks³ that, if a clause conveys any meaning clearly, it ought not to be transposed, even though the clear meaning be an absurd one. But, if it is plainly absurd, this shows that its real signification, as intended by the testator, cannot be clear. It should surely be transposed, if this will effectuate the obvious intention of the testator. At the same time, transpositions of clauses, it must be admitted, are violent phases of judicial construction.

If, however, estate A be given to B. and estate C be given to D., while the limitations and description of the lands show that the wrong parcels were given to B. and D., a transposition will be readily made.⁴ As to the transposition of words see further *Mason v. Jones*.⁵

¹ *Lorillard v. Coster*, 5 Paige, 172, 227.

² See *Covenhoven v. Shuler*, 2 Paige, 122.

³ Vol. I, 440.

⁴ *Mosley v. Massy*, 8 East, 149.

⁵ 2 Barb. 229; *Pond v. Bergh*, 10 Paige, 140.

§ 10. *Alteration of words.*

Even an alteration of words is sometimes made¹ by the Court. "All" may be read "any;" "without issue" may be read "leaving issue;" "her" may be read "their;"² "severally" may be substituted for "respectively;" "or" for "and,"³ and conversely. Thus "to A. or his heirs" has often been construed to mean "to A. and his heirs."

So, under a gift to A, and "if he die under twenty-one or without issue," or "unmarried or without issue," then, over, the word "or" will be read "and," in accordance with the manifest intention of the testator, that the devise or bequest over should only take effect in case neither contingency should happen.⁴

The principle of these cases is that the reference in the alternative is to persons who would take an interest derivatively through the donee, if he retained the estate by surviving the first contingency.⁵

In New York, the word "and" has been read "or," in *Van Vechter v. Pearson*,⁶ and numerous other cases. Similar rules of construction prevail in all the other States.

In *Richardson v. Spraag*,⁷ the bequest was to such of the daughters or daughters' children of the testatrix as should be living at her death. "Or" was read "and," so that the children of living as well as of deceased daughters participated in the gift. Jarman⁸ appears to approve of this construction. Yet, it would

¹ *Brailsford v. Heyward*, 2 Des. 18.

² *Keith v. Perry*, 1 Des. 353.

⁴ *Ib.*

⁶ *Van Vechten v. Pearson*, 5 Paige, 512; *Roosevelt v. Thurman*, 1 Johns. Ch. 220.

⁷ 1 P. W. 434.

³ *Ray v. Enslin*, 2 Mass. 554.

⁵ 1 Jarm. 448.

⁸ Vol. I, 451.

seem that the word "or" was purposely used to prevent a lapse to the families of the daughters who might die in the lifetime of the testatrix.¹ Thus, in *Girdlestone v. Doe*,² where a testator bequeathed £40 per annum to A. for life, and, after her decease, to B. or his heirs, it was held that B. did not take the absolute interest, but that there was a substitutional gift to his heirs in case he died in the lifetime of A. That B.'s estate was a remainder does not seem to affect this question.

In reading "or" as "and," and in all similar cases of altering the expression, the main object of such interpretation is not to reduce any express or implied direction to total silence.

§ 11. *Rejecting words.*

If a later clause in a will merely qualifies a preceding one, both can stand.³ But, if the two passages cannot be reconciled, the latter must prevail, if it is equally relative to the testator's primary intention. As to what amount of mutual repugnancy will lead to the expunging of the prior clause, see *Morrall v. Sutton*.⁴

Where one clause in a will gives certain property to one person, and a later clause gives the same thing to another, the latter alone, in the old cases, was held to take the gift, unless this was inconsistent with the testator's primary intention,⁵ or the latter limitation had been introduced to prevent a lapse by the death of the prior donee in the lifetime of the testator. Modern decisions greatly incline to regard both donees as joint beneficiaries. But, if there is an absolute repug-

¹ *Vide* 1 Cox, 241.

² 2 Sim. 225.

³ *Sweet v. Chase*, 2 N. Y. 73; *Stickle's App.* 29 Penn. St. 234.

⁴ 1 Phillips Ch. 533; s. c. 4 Beav. 478.

⁵ See *Hollins v. Coonan*, 9 Gill, 62; *Pratt v. Rice*, 7 Cushing, 209.

nancy between two clauses, and the relative importance of neither can be determined by the general scope of the will, and the presumption of a provision for lapse cannot be entertained, the former clause will be expunged. If that clause, however, is more consistent with the general scope of the will, then the latter will be rejected.¹

Sometimes the Court will expunge words rather than cut down a limitation. As, for instance, in *Doe d. Elton v. Stenlake*,² where the devise was to A. and her heirs for their lives, the phrase "for their lives" was rejected as repugnant and void. This decision, however, will not be followed except in very similar circumstances. Probably at the present day, even in England, the word heirs would be held, in a similar passage, to mean children rather than that the limitation for life should be expunged. In the United States, the word "heirs" would be still more readily regarded as a term of purchase.³

Of two inconsistent intentions the Court will try to select the one which the testator had probably more at heart.⁴ Expunging a passage, however, is only used as a *dernier resort*, for, if possible, effect will be given to every clause.⁵

§ 12. *Supplying words.*

It seems to be an error to suppose that words are ever "supplied," as distinguished from being implied, in a will. All that the Court does in this respect is not to amend an omission or rectify a mistake, but simply

¹ See *Bartlett v. King*, 12 Mass. 537.

² 12 East, 515.

³ See *infra*, ch. 6, "Rule in Shelley's Case."

⁴ *Malcolm v. Malcolm*, 3 Cush. 472; *Bradstreet v. Clarke*, 12 Wend. 602. See *Bradley v. Amidon*, 10 Paige, 235.

⁵ *Parks v. Parks*, 9 Paige, 107.

to construe provisions so liberally as that the same clause in a deed not executory might not be operative without the addition of more words. Implications in a will are, indeed, often rendered necessary by mistakes of omission. Still, the two things are plainly different: an implication construes the will as it is; a rectification amends and alters it.¹

Where a testator left annuities to two daughters in similar terms, but the annuity to one was liable in a certain contingency provided for in respect of the other, the Court construed the will so as to supply the omission.² But, as a rule, the maxim that the including of one is the excluding of another will apply. Thus, in *Nichols v. Romaine*,³ a declaration that a certain charge should not affect one residuary devisee made the charge affect the rest of the residuary devisees. As to rejecting words, see further, *Pond v. Bergh*.⁴

Under a devise to A., and the issue male of his body, and, if he die without issue of his body, over, the word male was supplied before the second word "issue."⁵ Words, however, will be supplied as sparingly as possible, and by no means with a view of effectuating the whole presumed intention of the testator.⁶ Yet the words "die," "leaving," &c., and the pronouns, are often supplied, or rather inferred from the context.⁷

Where a will is numbered into sections, words of limitation at the end of a section will be more readily

¹ *Hay v. Earl of Coventry*, 3 T. R. 83.

² *Stewart v. Chambers*, 2 Sandf. Ch. 382; see *Drake v. Pell*, 3 Edw. Ch. 251; *Pond v. Bergh*, 10 Paige, 140; *Carter v. Bloodgood*, 3 Sandf. Ch. 293.

³ 9 How. Pr. 512.

⁴ 10 Paige, 140; *Grim v. Dyar*, 3 Duer, 354.

⁵ *Tuck v. Frencham*, Moore, 13 pl. 50.

⁶ *Hamilton v. Boyles*, 1 Brev. 414.

⁷ *Brown v. Brown*, 1 Dana, 41; *Lynch v. Hill*, 6 Munf. 114.

applied to all the gifts in the section than if the will were not so numbered into parts.¹

§ 13. *Misdescription.—False demonstration.*

An addition of certain erroneous particulars—false demonstration, as it is termed—to a description otherwise perfect, produces no ambiguity if the gift is applicable only to one person and thing.² For, such words being inapplicable to any subject, their rejection does not affect the construction. Therefore, a bequest of stock in the A. Bank has been held to pass stock in the B. Bank; as the testator had no stock in the former bank.³ So, if real property is described as personalty, it may, nevertheless, pass. Thus, in *Woods v. Moore*,⁴ it was held that a devise of land would pass a mortgage on it if the testator had no other interest in land. So a bond described as given to O. for L.'s use has been held a sufficient description of a bond executed by S. and delivered to O. as agent for the use of L.⁵ A false demonstration is innocuous, and will be expunged only when the remainder of the description is sufficiently accurate. Otherwise the whole clause is, of course, null and void.⁶ It is laid down in *Smith v. Smith*⁷ that no extent of misdescription will neutralize the gifts, if the will, besides the false demonstration, contains sufficient marks of identification. This position seems irrefragable. As to false demonstration, see further, *Lush v. Druse*.⁸

¹ *Stevens v. Snelling*, 5 East, 87. ² *Woods v. Moore*, 4 Sandf. 579.

³ *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. 144.

⁴ 4 Sandf. 579.

⁵ *Smith v. Wyckoff*, 3 Sandf. Ch. 77; 3 Bradf. 393.

⁶ *Jackson v. Sill*, 11 Johns. 201.

⁷ 4 Paige, 271.

⁸ 4 Wend. 313; *Worthington v. Hylyer*, 4 Mass. 196; *Blague v. Gold*, Cro. Car. 447; *Davis v. Rainsford*, 17 Mass. 210.

§ 14. *Uncertainty of subject of gift.*

If the subject or object be once sufficiently identified in any legal way, either by construction, or parol, false additions will be inoperative.¹ A misnomer of a county, parish, or street, or a misdescription of a tenant is also unimportant.² A misdescription of the interest, as calling a leasehold freehold,³ or the converse⁴ error is unimportant where the testator has no other but the misdescribed property.

A devise of land by name, and described as situate in A. county, will pass the whole of the land, even though it is not wholly situate in A. county.⁵ A devise of "all my homestead farm in D., being the same farm whereon I now live, and the same which was devised to me by my father," will pass the whole of the homestead farm, though it appears that a part of it was not devised by the father.⁶

In *Bowman v. Milbanke*,⁷ the limitation "I give all to my mother," was held to be void, the word "all" being indefinite. In *Mohun v. Mohun*⁸ a like decision was arrived at. These cases would hardly, however, be followed now. Even in an early case, *Taylor v. Webb*,⁹

¹ *Drew v. Drew*, 8 Foster (N. H.), 489; *Blague v. Gold*, Cro. Car. 447, 473.

² See *Dodson v. Green*, 4 Dev. 488; *Hastead v. Searle*, 1 Ld. Raym. 728; *Brownl.* 131; *supra*, Part I, p. 122 *et seq.*

³ *Denn d. Wilkins v. Kemeys*, 9 East, 366.

⁴ *Day v. Trig*, 1 P. W. 286.

⁵ *Hammond v. Ridgley*, 5 Harr. & J. 245; *Dorsley v. Hammond*, 1 Id. 190.

⁶ *Drew v. Drew*, 8 Foster (N. H.), 489. See *Woods v. Woods*, 2 Jones Eq. N. C. 420; *Colpoys v. Colpoys*, Jacob, 464; *Fisher's Digest*, Title Will, § 3; *Doe d. Jersey v. Smith*, 2 B. & B. 553; *Goode v. Goode*, 22 Mo. 518.

⁷ 1 Lev. 130.

⁸ 1 Swans, 201.

⁹ *Styles*, 301, 307, 319.

the words, "I make my cousin, A. B., my sole heir and my executor," passed the testator's property to A. B.¹

But a bequest of "some of the best of my linen"² would even at the present day be void for uncertainty. So, also, would a request that a handsome gratuity be given to a certain person.³

Yet a definite devise out of a larger interest is good, as, for instance, a devise of two out of four acres; and the devisee shall elect.⁴ A devise of close A., the testator having two closes of that name, was held void in *Richardson v. Watson*.⁵ But, parol evidence is received to identify the close meant. If, however, no such evidence can be forthcoming, the devise is void, even at the present day, when gifts are rarely, or never void for uncertainty.

The phrase "what shall be left" will not be deemed void if relating to furniture or other articles that are subject to wear and tear, nor *semble* where the property, no matter of what kind it is, has been previously limited to another for life.⁶ So, if "what is left" means what is unappointed under a power given to the tenant for life.⁷ The older cases are all opposed to such readings, which, however, would probably be followed in any very doubtful case, even though not falling strictly within the principle of any of the later decisions.

¹ See *Rothmaler v. Myers*, 4 Des. 215; *Trippe v. Frazier*, 4 Har. & J. 446.

² *Peck v. Halsey*, 2 P. W. 387.

³ *Jubber v. Jubber*, 9 Sim. 503; see *Jones d. Henry v. Hancock*, 4 Dow. 145.

⁴ *Grace Marshall's Case*, Dy. 281 a. n. See *Hobson v. Blackburn*, 1 My. & K. 574.

⁵ 4 B. & Ad. 798.

⁶ *Cooper v. Williams*, Pre. Ch. 71, pl. 64; *Gibbs v. Tait*, 8 Sim. 132.

⁷ *Surman v. Surman*, 5 Madd. 123.

§ 15. *Uncertainty of object of gift.*

A devise to one of the sons of J. S. is void for uncertainty.¹ Yet a power to appoint to any of the sons of J. S. will be, in default of appointment, executed in favor of all equally by the Court. A devise to twenty of the poorest of one's kindred is void for uncertainty.²

A devise to a voluntary society passes an interest to the then members.³ Indeed, it would not be safe at the present day to rely upon any of the old cases with respect to the question what invalidates a gift for uncertainty.⁴

A devise, however, to one's heir-at-law or next of kin would probably now be not held void.⁵ And a devise to such persons as shall be testator's partners at the hour of his death has been held valid.⁶ Under a bequest to Robert, fourth son of B., the third son, whose name was Robert Henry, was held to take, the name of the fourth son being John William.⁷ In *Wood v. White*⁸ a testator bequeathed a legacy to J. Wood. Parol evidence was accepted to show that George Wood was the person intended. Here the will was insensible with reference to surrounding facts. But, if there was a J. Wood known to the testator, parol evidence should be excluded.

¹ See *Strode v. Lady Falkland*, 3 Ch. Rep. 183; *McDermott v. United Ins. Co.* 3 Serg. & R. 607.

² *Webb's Case*, 1 Roll. Ab. 609 (D.) 1.

³ *Bartlett v. King*, 12 Mass. 537.

⁴ See 1 Jarm. 322, 324.

⁵ *Lowndes v. Stone*, 4 Ves. 649. See 7 Sim. 363.

⁶ *Stubbs v. Sargon*, 2 Keen, 255. See *Prestwidge v. Groombridge*, 6 Sim. 171; *Powell v. Davies*, 1 Beav. 532.

⁷ *Gillett v. Gove*, 18 W. R. 423.

⁸ 32 Me. 340, in Eq. See *supra*, Part I, notes to Propositions 3 and 5.

Under a bequest to John and Benedict,¹ sons of A.B., a son named James (as there was no John) was held entitled.² The words, "members of my family" have been considered sufficiently definite.³ A bequest to a society named as of London was held, *in re* The Clergy Society,⁴ not to apply to a society of the name in the bequest, but which was out of London, and although there was no society at all of the name in the metropolis. Judge Redfield⁵ thinks it was a case of false demonstration, and this appears to be its true nature. The decision, however, cannot be deemed of much authority. The case of *Stringer v. Gardiner*⁶ also appears to be one fit for the reception of parol evidence. A name by repute is a sufficient description of a person.⁷ Devises to corporations have been construed rather strictly in those cases where corporations may legally take land by will.⁸ Yet it is likely that at the present day they would receive the same benignity of interpretation as if they were private individuals.

A testator gave to the School Commissioners and their successors of "South Farnham district, Essex county, for the schooling of the poor children of that district, \$1,000, to be put out at interest, and the

¹ *Smith v. Coney*, 6 Ves. 42; *Holmes v. Custance*, 12 Ves. 279; *Garth v. Meyrick*, 1 Bro. C. C. 30.

² See *Dowsett v. Sweet*, Amb. 175; 1 Jarm. 330; *Smith v. Smith*, 4 Paige, 271; s. c., 1 Edw. 189; *Trustees v. Peaslee*, 15 N. H. 317; *Woods v. Moore*, 4 Sand. Sup. Ct. 537; *Winkley v. Kaime*, 32 N. H. 268; *Douglas v. Blackford*, 7 Md. 8. *In re Bicket's trust*, 2 Eng. Law & Eq. 66.

³ *Hill v. Bowman*, 7 Leigh, 650.

⁴ 2 K. & J. 615.

⁵ Vol. I, 585.

⁶ 5 Jur. N. S. 260. See 1 Redf. 585.

⁷ *Sutton v. Cole*, 3 Pick. 232; *Newthway v. Ham*, Tamlyn, 316; *Parsons v. Parsons*, 1 Ves. Jun. 266, Sumner's notes. See *Standen v. Standen*, 2 Ves. Jun. 589.

⁸ *Attorney-General v. Sibthorp*, 2 Russ. & My. 107.

interest only to be applied for the schooling of said poor children." There were School Commissioners of the county Essex, of whom the testator was one at the time of his death, but they were not incorporated. There were no more school commissioners of South Farnham district, nor was there any such district, though there was an ancient parish of the name. The bequest was held void.¹ The case of *Janey v. Latone* is hardly reconcilable with *Minot v. Boston Asylum*.² In this case the legacy was to the "Boys' Asylum and Farm School." There being no institution or association of any similar name, except a body incorporated by the name of "The Boston Asylum and Farm School for Indigent Boys," this institution got the legacy.³

Owing to the admissibility of parol evidence to identify a beneficiary in cases of ambiguous description, a gift so limited very rarely fails.⁴

The law of wills is, in the respects we are now considering, based exactly on the same principles as the law of deeds, except, of course, that, in point of fact gross misdescriptions rarely or never occur in instruments made *inter vivos*. The tendency of the courts both in England and the United States is to deal more and more benignantly every day with loosely drawn

¹ *Janey v. Latane*, 4 Leigh, 327. See *Telfair v. Horne*, 3 Rich. Eq. 235; *Carter v. Balfour*, 19 Ala. 814.

² 7 Met. 416.

³ See *General Lying-in Hospital v. Knight*, 11 Eng. Law & Eq. 191; *McBride v. Elmer*, 2 Halst. Ch. 107; *Baldwin v. Baldwin*, 2 Halst. Ch. 211; *Calhoun v. Furgeson*, 3 Rich. Eq. 160; *Trustees v. Peaslee*, 15 N. H. 317; *Button v. Amer. Trust Soc.* 23 Vt. 336; *St. Louis Hospital Association v. Williams*, 19 Mis. (4 Bennett) 609.

⁴ *Smith v. Smith*, 4 Paige. See *Doe d. v. Huthwaite*, 3 Moore, 304; s. c. B. & Ald. 632.

wills, and to strive to effectuate the intention of testators, if this be at all practicable.¹

The early cases on the law of wills are, in the main, unreliable at the present day. Where, as in Lord Cheney's case, they have furnished a text that has been acted upon in subsequent decisions, the old authority has even improved by time. But an old will case, standing alone, is at present almost valueless. This is peculiar to the law of wills. As regards conveyancing *inter vivos*, the old common law rules apply to every new phase of events, except so far as statute law has otherwise provided. Wills, on the contrary, being construed according to the intention of the testator, have not been interpreted according to any strict general rules; or rather, indeed, the principles of testamentary interpretation have been altered, and the courts will now accept parol evidence, in many cases where it would have been formerly held to be inadmissible. The old decisions, too, on other points, such as the meaning of the word "family," "relations," &c., would not be followed at the present day. Scarcely any testamentary gift will be held void at present. Besides, then, the inherent mutual diversities of cases, the law of the construction of wills has gradually varied, both with respect to intrinsic and extrinsic evidence. Old testamentary cases, therefore, must stand on their merits. By themselves they are not now of much or, indeed, of any authority, even in England. They have still less weight in America.

Thus in *Doe d. Hayter v. Joinville*,² a devise to the testator's "brother and sister's family" was held void for uncertainty, inasmuch as there were children of two

¹ See Broom's Legal Maxims, title, *Falsa Demonstratio non nocet cum de corpore constat*; *Brewster v. McCall*, 15 Conn. 274.

² 3 East, 172.

sisters of the testator, one living and one dead, and it did not appear which of them was intended. All such difficulties are now aided partly by parol evidence and partly as in *Doe v. Hayter*, by settled rules of construction as to the meaning of the general expressions used. A gift to the son of A. B.¹ is even now-a-days stated in text-books of authority to be void for uncertainty. But it is probable that the American courts would admit of parol evidence rather than construe the gift as void for uncertainty. Jarman himself observes² that a devise to a person sustaining a given character, as to "my brother's son," &c., without furthermore, raises a fit case for the adduction of parol evidence, if there be more than one person to whom the devise is applicable. There is no doubt of the soundness of this view in principle, though, unhappily, there is no case exactly in point.

Several questions, therefore, arise in respect to every such vague designation. First, whether the specification of the donee is not void for uncertainty;³ secondly, as an invalidity upon the ground of uncertainty is very rare, whether the precise person may not be inferred from evidence of the testator's circumstances, habits, and mode of life, but not from his expressions or declarations regarding the intended objects of his bounty;⁴ thirdly, whether direct evidence of such declarations, that is to say, of the testator's intention, may not be produced;⁵ fourthly, whether the specification of the donee is not complete in the will, and so precludes the application of parol evidence as in *Doe v. Westlake v. Westlake*.⁶

¹ *Dowsett v. Sweet*, Amb. 175.

² Vol. II, 375.

³ *Hand v. Hoffman*, 3 Halst. 71; *Kelly v. Kelly*, 25 Penn. St. 460.

⁴ *Wootton v. Redds*, Exr. 12 Grat. 196; *Doe v. Hiscocks v. Hiscocks*, *supra*, Part I, pl. 183.

⁵ *Gass v. Ross*, 3 Sneed, 211.

⁶ 4 B. & Ald. 57.

In *Doe d. Westlake v. Westlake*, the devise was unto "Matthew Westlake, my brother, and to Simon Westlake, my brother's son." The testator had three brothers, Thomas, Richard, and Matthew, each of whom had a son named Simon; Thomas and Richard were mentioned in previous parts of the will. The court held that there was no latent ambiguity or any difficulty in applying the bequest so as to involve a reconsideration of the construction of the will, and that it was clear on the face of the will that the nephew intended was the son of Matthew, he being mentioned immediately after the devise to Matthew. The clauses of the will marked off the different devises to the various members of the testator's family. This grouping of the devisees evidently prevented any ambiguity or doubt arising as to which nephew was intended by the devise to the "brother's son."

Parol evidence is of course admitted to induce an operation of the rule in *Wild's case*¹ rather than of the rule in *Shelley's case*. But, if either of the contending nominees die in the lifetime of the testator, this event, of course, will not affect the construction of the gift.² For neither intrinsic evidence, that is to say construction, nor extrinsic evidence, which is also a kind of construction, is ever allowed to be controlled by accident, and not law. Latterly too, parol evidence is not in certain cases admitted as freely as it was in early times.³

Parol evidence is more freely admitted in America than in England, both under Propositions Three and Seven (*ante* Part I).⁴ Yet, parol evidence of intent will not, as a rule, be received if the description suits

¹ 6 Co. Rep. 17.

² *Jones v. Newman*, Sir W. Black. 60.

³ 1 Greenl. on Ev. 327.

⁴ Pp. 50, 51.

one person or thing more than another.¹ But in cases where the description is inaccurate as to all the claimants, and any parol evidence is admitted in aid of the construction (the meaning of the passage not being capable of being settled by construction), it is generally hard to determine whether the disposition so aided by evidence of the testator's circumstances really suits one claimant or property more than another. The American rule, therefore, on this particular point is more likely to become the ultimate standard than the rule in *Hiscocks v. Hiscocks*,² which in such cases admits of parol evidence of the testator's circumstances, but not of his intention.

There is some reason to contend that where, as under the Revised Statutes of New York, a will of land speaks from the death of the testator, parol evidence ought to be no longer admissible to show that a devise was insensible at the time of the making of the will, if the words of the disposition are taken in their primary sense. If the gift is sensible, or might be sensible, at the time of the testator's death, the usual ground for the adduction of parol evidence in aid of the construction is taken away. In other words, land, in respect of this point, appears to be placed on the same footing as personalty, and is no longer specific as regards the testamentary or disposing power, though it has been properly held to be specific in England, under 1 Vict., c. 26, in contests between the residuary devisee and specific legatees of chattels, with respect to their relative liability to the testator's creditors. It is doubtful, however, whether as regards the point now under con-

¹ See *Horwood v. Griffith*, 4 De G. M. & G. 708; *Wilson v. Squire*, 1 Y. & C. C. C. 654.

² *Supra*, Part I, pl. 183.

sideration, the courts will hold that land is, to all intents, assimilated to personalty.

A bequest of personalty does not operate as an execution of a general power, because, though the testator have not personalty at the time of making the will, yet he may acquire such property before his decease.¹ Why should not this rule, it may be asked, be now extended to devises of land, since the testator may contemplate the purchase of land, though he has none at the time of making the will. The present rules regulating appointments of realty, however, will probably keep their ground, not so much perhaps by reason of their intrinsic merits, as on account of the imperfections of the technical rules to which a contrary view would assimilate them.

§ 15. *General observations.*

In *Pray v. Belt*,² a power was given to the executors, *finally*, to decide what was the testator's intention, in case of dispute. The courts, however, would not hold their jurisdiction ousted by such a direction, if the executors abused the trust.³ To deny access to the public tribunals is to shut a highway open of common right to all citizens. A direction of the nature referred to, therefore, infringes upon a rule of public policy which it is not within the sphere of private donation to restrict or alter.

The construction of a will cannot be affected by the occurrence of contingencies against which the testator might have provided differently if they occurred to his mind. The court can place itself only in the position of the testator, but cannot interpret the will by the

¹ *Jones v. Tucker*, 2 Mer. 533.

² 1 Pet. 670.

³ *Ib.*

light afforded by any subsequent occurrence not amounting to a revocation or ademption of a gift in the will. See further, as to principles of testamentary construction, *Terpenning v. Skinner*,¹

Where the description is merely defective, parol evidence is freely admitted in America as to the testator's circumstances. See *Howard v. Am. Peace Society*.²

On the other hand, there is an equally strong tendency in both England and the United States, to settle questions of misdescription or false demonstration by construction, if possible, rather than by parol evidence, though at the same time there is a growing desire on the part of the courts of both countries to give every disposition some effect, if this can be done by construction.

¹ 30 Barb. 373; *Post v. Hover*, 33 N. Y. 593; *Bates v. Hillman*, 43 Barb. 645; *Carter v. Hunt*, 40 Barb. 89; compare *Lovett v. Kingsland*, 44 Id. 560; *De Nottebeck v. Astor*, 3 Kern. 98; *Mann v. Mann*, 14 Johns. 1; *Howland v. Union Theolog. Sem.* 3 Sandf. 82; *Chrystie v. Phyfe*, 19 N. Y. (5 Smith) 344.

² 49 Me. 288. See also *Winkley v. Kaime*, 32 N. H. 268; *Haydon v. Ewing*, 1 B. Mon. 113; *Doe v. Roe*, 1 Wend. 541; *Domestic and Foreign Missionary Society's Appeal*, 30 Penn. St. 425; *Britton v. American Tract Society*, 23 Vt. 336.

CHAPTER III.

FRAUD, ACCIDENT, OR MISTAKE.

§ 1. *Fraud.*

Questions of fraud are triable by means of the issue of fact *devisavit vel non*, and are not, therefore, properly comprised in a treatise on the construction of wills. What is fraud or undue influence (which is a species of legal fraud), is a question of fact, as to which no general rules can be laid down.¹ It seems desirable, however, that, except in cases where the testator's sanity is in question, the court should be astute in not regarding every high degree of influence over a testator as undue; and this, indeed, is considered to be the American rule.

It is said in *Marsh v. Tyrrell*,² that undue influence by a husband is more easily proved than if the influencing party were a stranger. But, this proposition is opposed to all the dictates of natural law and affection. The influence of a husband, wife, or child should rarely or never be considered undue, except in cases where the testator was tainted with mental infirmity.³

A testator's knowledge of the contents of his testament will be presumed, if he were of sound capacity.

¹ See *Dietrick v. Dietrick*, 5 Serg. & R. 207; *Nussea v. Arnold*, 13 Serg. & R. 323; *McMahon v. Ryan*, 20 Penn. St. 329; *Chandler v. Ferris*, 1 Harring, 454; *Mountain v. Bennett*, 1 Cox, 355; *Hacker v. Newborn*, Styles. 427.

² 2 Hagg. 84-141.

³ See *Small v. Small*, 4 Greenl. 220; *Lide v. Lide*, 2 Brev. 403; *Elliott's Will*, 2 J. J. Marshall, 340; 1 Redf. 521, *et seq.*

But, if he were mentally weak, proportionately strong proof must be given that he was aware of the contents of the document. Proof of capacity, and of the act of execution, therefore, raise a presumption of the testator's knowledge of the contents of the instrument. The mere fact that the will was not prepared at the testator's request does not invalidate it; nor is the omission to read it over to him very material, if there is reason to believe he knew its contents.¹

As to undue influence, see further *Matter of Walsh*.²

When a provision in a will is held invalid on account of fraud or undue influence, the rest of the will may, nevertheless, be valid.³ So, if a passage in a will has been inserted contrary to, or without the directions of, the testator, it is void, but does not affect the remaining portions of the will.⁴

Independent parts of a will are unaffected by any fraudulent or void clauses,⁵ except in the respects described in chapter xxvi *infra*, on "Void Testamentary Gifts."

If a devise is made to several persons by reason of a promise by one devisee, which vitiates the gift to him, it is void as to all. See *Tee v. Ferris*.⁶ It is an incident of all deeds and contracts, that if any part of

¹ *Gerrish v. Nason*, 22 Me. 438; *Vernon v. Kirk*, 30 Penn. 218; *Clifton v. Murray*, 7 Ga. 564.

² 7 N. Y. Leg. Obs. 153 S. P. 1854; *Leacraft v. Simmons*, 3 Bradf. 35; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Bleeker v. Lynch*, 1 Bradf. 458; *O'Neil v. Murray*, 4 Bradf. 311.

³ *Lord Trimbletown v. D'Alton*, 1 Dow & Cl. 85; s. c. 1 Bligh, N. S.; *H. L. Cas.* 427; see *Florey v. Florey*, 24 Ala. 241.

⁴ *Comstock v. Hadlyme*, 8 Conn. 254; *Abercrombie v. Abercrombie*, 27 Ala. 489; *Harrison v. Morton*, 2 Swan, 461.

⁵ *Florey v. Florey*, 24 Ala. 241.

⁶ 2 K. & J. 357.

the consideration is contrary to public policy, the whole indivisible contract is void, because the consideration is the foundation of the whole matter, and the degree of influence which the bad consideration exercises on the granting party cannot be estimated and discerned from the other motives. But, if the consideration is good, though some of the covenants contracted for are void and illegal, yet the good stipulations will be enforced, if they are clearly separable from the unsound ones. An action can be maintained for their breach at law, or they can be specifically enforced in equity. For chancery always enforces what is good and definite, if clearly separable from what is void or indefinite.

A legacy given by a woman to a person whom she regards as her husband, but who is secretly married to another, is void as fraudulent.¹ But a legacy given to a person whom the testator erroneously supposes to be his child is good. So is a legacy to an unchaste wife, and a legacy to the child of a bigamist is not avoided by reason of the bigamist obtaining, as the reputed wife of testator, a gift to herself. Nor will a false affirmation of celibacy or marriage avoid a gift, unless the testator is injuriously affected by such affirmation.²

§ 2. *Accident or mistake.*

A mistake patent on the face of the will is rectified by chancery.³ When the mistake is patent, equity does not, strictly considered, travel outside of the written

¹ Digest, lib. 35; tit. 1 L. 72, § 6; *Wilkinson v. Joughin*, 12 Jur. N. S. 330.

² *Rishton v. Cobb*, 9 Simons, 615.

³ *Mellish v. Mellish*, 4 Ves. 45; *Phillips v. Chamberlaine*, 4 Ves. 51; *Milner v. Milner*, 1 Ves. Sen. 106; *Door v. Geary*, 1 Ves. Sen. 255.

will, or act on parol evidence at all. The case is rather one of *cy pres* construction or *falsa demonstratio*.¹ Equity does not relieve in such cases on the ground of mistake in the general equitable sense of that term,² or admit parol evidence,³ but merely reconciles seemingly incongruous passages.

A mistake not patent on the will is irremediable. Therefore, parol evidence is not admissible to show that the testator made his will under the erroneous impression that one of his children was dead,⁴ or that the will was in any respect owing to his mistake of facts.⁵ But, mistakes in the description of gifts or of donees may be rectified by extrinsic evidence.

In the case of the Earl *v.* the Countess of Newburgh, the mistake appears not to have been completely or clearly proved. But in *Langston v. Langston*,⁶ a line was omitted by the person who copied the will for signature. Yet, Lord Brougham, though he inspected the draft for other purposes, admitted that the evidence was not to be received. His Lordship, indeed, should not have looked at proofs forbidden by the law of evidence.

It is, however, settled that mistakes of the nature of omissions, as distinguished from misdescriptions, cannot be rectified by parol. This was decided in respect of real estate in *Andress v. Weller*.⁷ Neither can an omission be supplied in respect to personalty by parol and the written instructions given to the scrivener. See

¹ *Danvers v. Manning*, 2 Br. C. C. 18; see *Giles v. Giles*, 1 Keen, 692; *Eatherly v. Eatherly*, 1 Caldwell, 461.

² *Lady Newburgh's Case*, 5 Madd. 364.

³ *Mann v. Mann*, 1 Johns. Ch. 231.

⁴ *Gifford v. Dyer*, 2 R. L. 99.

⁵ 2 *William's Ex.* (2 Amer. ed. c. 2, § 4, p. 867; Part I, *supra*, p. 265).

⁶ 8 Bligh, N. S. 167.

⁷ 2 Green Ch. 604, 608.

also *Fawcett v. Jones*,¹ and *Hughes v. Turner*,² where it was held that a revoked will could not be examined for light to construe a subsequent unrevoked will.

Equity will rectify a clear mistake or omission in a will, if it is apparent on the face of the document, as in the case of the mistake of a figure.³ An omission, however, can never be apparent so as to obtain the aid of the court. For, if it can be spelled out from the rest of the will, it is not wholly unexpressed by the testator, and is not a real case of omission. Parol evidence is admissible to prove that a clause has been inserted, but not that one has been omitted by mistake.⁴

Parol evidence is admissible to show that a will or any other document is not as it purports to be, a fair *bona fide* expression of the will of the person whose property is sought to be charged by it. Therefore, when a will or any part thereof has been obtained or directly occasioned by fraud, accident, mistake, or inadvertence, it will be annulled by the court, and the intestacy of the testator will be so far established. The parol evidence is admissible to show that the will is not genuine, but not to establish a basis for rectifying the instrument. It will be simply annulled, but not reformed, although if it were a contract it might be specifically enforced, according to the intention of the parties, as proved by parol.

Parol evidence is also admissible to show that a will is void in law, or has been defeated in fact by lapse or ademption.

¹ 3 Phil. 434.

² 4 Hagg. 52.

³ *Ouseley v. Anstruther*, 10 Beav. 453. ⁴ See *supra*, Part. I, p. 277, *et seq.*

CHAPTER IV.

MEANING OF CERTAIN WORDS AND PHRASES.

§ 1. *Terms of devise. Real terms.*

The primary meaning of a term or phrase, as denoting merely personalty or realty, becomes unimportant, if, as is not unfrequently the case, the context shows that the testator used the terms in a different or peculiar sense. Accordingly, the words "devise," "bequeath," "realty," "personalty," "legacy," &c., are convertible, if the testator so uses them. However, if he uses in one part of the will the phrase "house, land, goods, and chattels," and in a subsequent part of the will uses the same phrase with the omission of the word land, the omission will not be deemed accidental, but will have the effect of not conveying the land in the second clause.¹ And yet even this decision seems unsatisfactory, such little weight is to be given to the use or omission of a single descriptive term in a will.

All the English decisions which have widened the grammatical meaning of terms so as to pass property not ordinarily comprised within their signification may be regarded as having full force in America.² But such decisions of the English courts as are technical and restrictive are to be regarded here with caution, and,

¹ *Roe v. Walker*, 3 B. & P. 375.

² See *Ferguson v. Zepp*, 4 Wash. C. C. 645; *Wheaton v. Andress*, 23 Wend. 452.

unless confirmed by a long series of American authorities, they must always be considered weak.

The term "land," by the Revised Statutes of Massachusetts, ch. 61, § 32, comprises tenements and hereditaments. Though the term ordinarily does not include incorporeal rights, yet it will pass them, if the testator has no other real estate.¹ In the same State the words "estate," "property," carry realty, unless restrained by the context.² Similar rules prevail in Connecticut,³ and the other States.

The word estate has, except in very early cases, always conveyed real property, unless the term be used as a general word after a specific description of chattels, and with reference thereto,⁴ or else is explained by the context to mean merely personal estate. Even if the will contains a devise of realty, the term estate in a residuary clause may still, of course, by force of the context, be confined in meaning to personalty.⁵ If the testator uses, in connection with the word estate, the terms "bequest," "bequeath," "legacy," and other words descriptive of personalty, this use of terms may also cut down the meaning of "estate." "Land" comprises all corporeal realty, whether in possession or not. "Tenement" includes all realty, whether corporeal or incorporeal, such as rights of way, rent-charge, &c. "Hereditament" includes land, tenements, and heir-looms.

Where no local statute is in question, the phrases

¹ 1 Jarm. 615. See *Bullard v. Goffe*, 20 Pick. 252; *Hunt v. Hunt*, 4 Gray, 193.

² *Kellogg v. Blair*, 6 Met. 322.

³ *Korn v. Cutler*, 26 Conn. 4; 2 Redf. 318.

⁴ See 2 Hill Abr. of Real Estate; *Morrison v. Temple*, 6 Binn. 97; *Jackson v. Delany*, 11 Johns. 365; *Godfrey v. Humphrey*, 18 Pick. 539; *Bullard v. Gough*, 20 Pick. 252.

⁵ *Woollam v. Kenworthy*, 9 Ves. 137; *Budsall v. Applegate*, 1 Spencer, 244.

"land," "real estate," include freeholds and copyholds, held beneficially or in trust, but not leaseholds, unless they are blended with freeholds.¹ A general devise of land, however, will pass only the legal estate in a mortgage, and not the money secured by it.²

The term "property" will pass both realty and personalty, if there is nothing in the context to the contrary,³ and the legal presumption is in favor of this extended meaning of the word.⁴ The term also embraces choses in action.⁵

The phrase "all my property of every description" will pass everything, whether real or personal, vested or in expectancy, belonging to the testator.⁶ In *Hopewell v. Ackland*⁷ the phrase "whatsoever else I have in the world," was held to convey realty in fee.

A devise of rents and profits is a devise of the land itself.⁸ So, a gift of the produce of personal property is equivalent to a legacy of the corpus.⁹

A reversion, or lease *pur autre vie*, will pass under a general devise of land, even though there is other property to satisfy the devise.¹⁰ A reversion in fee in settled lands will also pass under a devise of lands not settled. A reversion, in short, is synonymous with land.¹¹

Even though some of the limitations be inapplicable to a reversion, yet it may pass, as the limitations

¹ *Thompson v. Lady Hawley*, 2 B. & P. 303.

² *Woodhouse v. Meredith*, 1 Mer. 450.

³ *Jackson v. Hansel*, 17 Johns. 281; *Hurdle v. Outlaw*, 2 Jones Eq. (N. Car.) 75.

⁴ 1 Jarm. 664.

⁵ *Fogg v. Clark*, 1 N. H. 163; *Morrison v. Semple*, 6 Binn. 94; *Brown v. Dysinger*, 1 Rawle, 408.

⁶ *Hurdle v. Outlaw*, 2 Jones Eq. N. Car. 75.

⁷ 5 Salk. 239.

⁸ *Van Bulhard v. Nace*, 1 Grant's Cases, (Penn.) 233; 1 Johns. Ch. 499; 9 Mass. 372.

⁹ *Adamson v. Armitage*, 19 Ves. 416.

¹⁰ *Steel v. Cook*, 1 Met. 281.

¹¹ *Rooke v. Rooke*, 2 Vern. 461.

will be held to apply to other lands,¹ if the testator have such. This rule applies also to deeds. Even if the testator have no other lands but the reversion, yet, the incongruous limitations will be expunged *ut res magis valeat*.²

The phrase "all I am worth" will carry realty.³ This case exemplifies, in Jarman's opinion,⁴ the extreme point to which the decisions have gone.

As the word "devise" will not always carry realty,⁵ so, conversely, the term "bequeath" will not always be confined to mere personalty. Yet, the phrase "all I shall die possessed of at the time of my death" has been held in England not to carry realty.⁶ A different construction would probably be adopted in America.

A devise of a West Indian plantation will carry the stock and implements upon it.

The word "effects," without the prefix "real," will not carry land, and in *Camfield v. Gilbert*⁷ this conclusion was arrived at, though the word "effects" was followed by the phrase "of what nature, kind, or quality soever." This was an unnatural construction, and would probably not be followed in America. On the other hand, in *Roe d. Penwarden v. Gilbert*,⁸ the phrase "personal and testamentary estate and effects whatsoever" was held to have passed the fee. Yet, it is probable the testator, from his use of the word "personal," intended to confine the meaning of the term "testamentary" to the personalty for which the eccles-

¹ *Doe d. Cholmondeley v. Weatherby*, 11 East, 322.

² See *Strong v. Teatt*, 2 Bur. 912; overruled by *Church v. Mundy*, 12 Ves. 426.

³ *Huxtep v. Brooman*, 1 B. C. C. 437.

⁴ 1 Jarm. 681.

⁵ *Camfield v. Gilbert*, 3 East, 510.

⁶ *Monk v. Mawdsley*, 1 Sim. 286.

⁷ 3 East, 510.

⁸ 3 Bro. & Bing. 85.

ialtical courts gave probate. If the will contains specific devises of land, general terms, such as property, &c., will the more readily be held to pass realty.¹

Peculiar interests in land, capable by custom of being conveyed in a particular manner, such as copyholds not surrendered to the use of testator's will, can still pass in equity by a devise of land or realty, if the testator has no other real estate,² or rather, as the construction of a will at law and equity is the same, equity will, in favor of certain persons, supply the defect, if it be not one affecting the execution of the will itself. Leases or terms will also pass under a general devise of land, if the testator has no other realty.³

In *Doe d. Spearing v. Buckland*,⁴ a preamble to the will expressed an intention to convey all the testator's estate, both real and personal. Yet, a bequest of the residue of his "estate and effects of any nature" whatsoever to A., his executor or administrator, in trust, to add the interest to the principal, was held not to comprise realty.

General terms will the more readily be confined to personalty only, if the legatee is also named executor.⁵ But, the force of the word land would hardly at the present day be confined in any State to leaseholds or rents due on freeholds, even if the devisee is also named as executor, and though there be an exception from the general gift of articles of personalty only.⁶

Lands which the testator has contracted to buy will pass under a general devise,⁷ and, conversely, as regards lands which he has contracted to sell, only the legal interest will pass, according to the maxim that equity

¹ 1 Jarm. 669.

³ *Rose v. Bartlett*, Cro. Car. 293.

⁵ See *Noel v. Hoy*, 5 Madd. 38.

⁷ *Acherley v. Vernon*, 10 Mod. 518.

² 1 Atk. 385.

⁴ 6 Durn. & E. 610.

⁶ *Thomas v. Phelps*, 4 Rus. 348.

regards that as done which ought to be done.¹ Jarman is of opinion that if the bargain for sale is afterwards rescinded, the devisee may hold for his own benefit. But, this view is contrary to the rule that a resulting trust, arising from construction, is not defeated even by parol evidence of a contrary intention by the testator. The view in question is also opposed to the general rule of construction, that the interpretation of a will is not to be affected by subsequent events.

The word "house" in a will is equivalent to mesuage, and will pass the land on which it is built, as also the curtelage, without the word "appurtenances."²

Where land was conveyed by a deed with all the buildings thereon, except the brick factory, the land on which the factory stood, and the water privilege appurtenant thereto did not pass by the deed.³ *A fortiori*, such a construction would prevail, where the conveyance was by will, exceptions in which are construed with the same liberality as grants.

A homestead let to tenants, and adjoining another homestead occupied by testator, will not pass under a devise of his "house-lot," though testator bought it for the purpose of annexing it to the house-lot.⁴

The word "appurtenances" in England, at the present day, will not pass land unless it consist of pleasure-ground, gardens, or the like, attached to a house. In America, the term is construed liberally,⁵ and may carry land.⁶

¹ Knollys v. Shepherd, 1 J. & W. 499. See Drant v. Vause, 1 Y. & C. C. 580. Hawkins on Wills, p. 39.

² Bennet v. Bettle, 4 Rawle, 339; Rogers v. Smith, 4 Penn. St. 93.

³ Allen v. Scott, 21 Pick. 25.

⁴ Perkins v. Jewett, 11 Allen, 9.

⁵ Otis v. Smith, 9 Pick. 293; see Leonard v. White, 7 Mass. 6.

⁶ Otis v. Smith, 9 Pick. 293; see 7 Mass. 6; 12 Pick. 441.

It thus appears that the word "appurtenances," in connection with "messuage," will not pass land in England, but, *semble* it will in the United States.

The terms, "occupy," "occupation," mean ownership, and not merely a condition of personal occupancy. A devise of the occupation of land or a house to A., therefore, passes the interest to A., and he need not reside on the premises.¹ A like rule of construction is applicable to deeds.²

A reference to occupancy, as a rule, is mere description, and will neither enlarge nor limit the previous terms of the devise. But though a devise of all "my farm in the occupation of B., called A.," will pass only the land so occupied, yet a devise of "my farm called A., in the occupation of B.," will pass the whole farm.³ However, a devise of a house to A., he to permit B. to occupy and dwell in it, gives B. no interest, but only a right of occupation personal to himself.⁴

A devise of premises, as now in the occupation of A., was held, in *Polden v. Bastard*,⁵ not to pass a privilege enjoyed by A., of drawing water from a pump on other premises of the testator, although it was the only means for obtaining water for the use of the premises devised.

Although words of occupation are not always restrictive, yet they sometimes have this effect, particularly where the bulk of the property is not in the occupation of the person described, and is not designated by a name comprehending the whole.⁶ "My farm on which I now live" will not comprise a lot with a dwelling-house let out as a distinct lot.⁷

¹ *Vide* *Rabbeth v. Lequire*, 4 De. G. & J. 406.

² *Rex v. Inhabitants of Easington*, 4 T. R. 177.

³ See *Doe d. Beach, v. Earl of Jersey*, 1 Barn. & Ald. 550.

⁴ *Gardner v. Wagner*, Baldw. 454.

⁵ Law Rep. 1 Q. B. 156.

⁶ See *Allen v. Richards*, 5 Pick. 512.

⁷ *Jackson v. Meyer*, 13 Johns. 531.

Some of the American decisions narrow devises as much as the English cases do. For instance, in *Brown v. Saltonstall*¹ a testatrix owned in S. a house and garden, and several adjacent lots of land, with houses thereon, which were held by tenants. The phrase in her will, "I give unto M. my house and land in S. now occupied by me," was held not to pass the land and houses let to tenants. There the word land was held to mean garden. Yet the phrase "now occupied by me" might have been rejected as false description, or, rather, held to mean "the rents which are now received by me." In both countries, however, there is a growing disposition not to suffer the term house to convey anything beyond the curtilage thereto, unless the context is strong to the contrary.

"Lot" will not comprise a distinct detached lot with a dwelling-house on it.² "Farm" in England means land let on lease. In America it usually means the land managed by a single proprietor. Parol evidence would doubtless be admitted in America to show what was locally meant by the word farm. Yet it will not always pass a distinct lot,³ though it will pass a distant lot if once part of it, and never severed.⁴ The word "mill" carries the land under and near it, so far as the same has been always used with the mill.⁵

In England leaseholds⁶ will not, but copyholds⁷ will, pass under a devise of "farms." In the United States, the meaning of the word farm would probably depend on the local signification of the term:

¹ 3 Met. 423.

² *Jackson v. Meyer*, 13 Johns. 531.

³ *Aldrich v. Gaskill*, 10 Cush. 155.

* ⁴ *Aldrich v. Gaskill*, 10 Cush. 155.

⁵ *Whitney v. Olney*, 3 Mas. 280.

⁶ *Arkell v. Fletcher*, 3 Jur. 1099.

⁷ *Doe d. Belasyse v. Lucan*, 9 East, 448.

As words of mere affirmation and suggestion do not restrict, so neither will they extend, the meaning of a devise. Therefore, a devise of lands at A., in the parish of B., "which I purchased of C.," will not include lands not at A., though purchased of C.¹

A term or lease for years is a chattel, and passes as personalty.² The word, "effects" will sometimes pass real estate.³

The phrase "worldly goods of all sorts and kinds" has been held to comprise only personalty.⁴ This case shows that the distinctive conveyancing used for land in both deeds and wills cannot be too soon abrogated. On the other hand, personalty ought to be endowed with every capacity to support a remainder which land has. These reforms, together with the adoption by statute in every State of a presumption that every gift by will is of the full property, unless a contrary intention appears, would leave our testamentary law in a very sound state. The courts already ignore the ultra technical force given in England to the rule in *Shelly's* case.

§ 2. *Terms of bequest—Personal terms.*

The word "goods," like "land," is a term of the most comprehensive signification, and, if uncontrolled by the context, will pass all personalty, whether in possession or action. But a bequest of goods at a particular place will only pass the goods there that *savor of locality*, as furniture, plate, &c., bank-notes and ready money, but

¹ *Doe v. Tyrrell v. Lyford*, 4 Mau. & S. 550.

² *Brewster v. Hill*, 1 N. H. 350.

³ *D'Almaine v. Moseley*, 21 Eng. L. & Eq. 134; *Smith v. Dunwoody*, 19 Ga. 238.

⁴ *Bradford v. White*, 6 Whart. 236.

not bonds or choses in action.¹ In America, however, no such distinction would now probably be taken between bank-notes and bonds, or other choses in action, evidenced by written securities, though it is doubtful that the term "goods" would be applied here in a difficult case to either bank-notes or bonds.

Household goods will pass all articles of household not consumed by the enjoyment, such as plate, pictures hung up, running horses, &c., but not goods kept there for purposes of trade or victuals.²

The phrase "goods and chattels" has a less extensive primary signification than the term "effects," which includes choses in action, money, shares in the public funds,³ and chattels real.⁴ In practice, however, owing to the force of the context, all these phrases will be virtually synonymous.

"Other goods" will not pass ready money, cash and bonds, if there is a residuary clause. For this would then be rendered nugatory; but the courts endeavor to effectuate both particular and residuary dispositions.

The term "effects," unaided by the context, carries only personalty.⁵ It was not so from the beginning, however; and the earlier cases on this point are certainly the more solid in point of sense. The law, nevertheless, is now settled the other way in England. But it is doubtful whether the American courts would not construe the phrase "all my effects," or "all my worldly goods," as equivalent to "all my property."⁶

¹ See Perkin's Note to 1 Jarm. 691.

² *Kendall v. Kendall*, 4 Russ. Ch. C. 360.

³ *Re Heirne v. Wigginton*, Mad. & Geld. 119.

⁴ *Mullins v. Smith*, 1 Drew & Sm. 204; s. c. 8. W. R. 739; see 3 Russ. 467; and Redfield's Comments thereon, vol. II, 102.

⁵ *Doe v. Haw v. Earles*, 15 M. & W. 450.

⁶ See *Wheaton v. Andrews*, 23 Wend. 452; *Harper v. Blean*, 3 Watts, 471; 2 Redfield on Wills.

"Household effects" is still more comprehensive than "household goods," and will pass even articles consumed by the enjoyment, such as wines, books, but not a pony or a cow, a watch, or a gun, unless it is used for domestic defence.¹ "Personal property" carries half pay.²

The phrase, my "fortune," is confined to personalty.³ General words will be the more readily extended in meaning if there is no residuary clause. General phraseology will not be restricted to previous particular articles, if such a construction will lead to a partial intestacy⁴ on account of the absence of a residuary clause, or other disposition of the property in question.⁵

In *Peppin v. Ellison*,⁶ it was held that the word property does not include choses in action, although the word estate comprises them.

"In-door moveables" will not pass promissory notes,⁷ but fixtures in a leasehold house belonging to the testator will pass under a devise of furniture.⁸

Money comprises all documents payable to bearer. Of course, the term may be used by the testator to pass all his personal estate.⁹

A gift of "money" has been held in England not to pass stocks in the public funds.¹⁰ This decision is highly technical, and seems to be unsound. It is also opposed to *Waite v. Coombes*.¹¹ The term "money" in

¹ 1 Sim. & Stu. 189.

² *Wood v. George*, 6 Dana, 343.

³ *Maitland v. Adair*, 3 Ves. 231.

⁴ *Gibbs v. Lawrence*, 7 Jur. N. S., 137.

⁵ *Browne v. Cogswell*, 5 Allen, 556; but see *Delamater's Estate*, 1 Whart. 362.

⁶ 12 Ired. 61.

⁷ *Penniman v. French*, 17 Pick. 404.

⁸ *Paton v. Shepherd*, 10 Sim. 186.

⁹ *Stratton v. Hillas*, 2 Dru. & War. 51.

¹⁰ *Lowe v. Thomas, Kay*, 369.

¹¹ 5 De G. & Sm. 676.

America would doubtless pass all debts, annuities, stocks and securities belonging to the testator. The phrase "ready money" is, perhaps, usually different in meaning. It will not include unreceived dividends on stock in England.¹ The term "money," however, used in a residuary clause, will be as extensive in meaning as the funds forming the residue.²

"Money" does not pass money due.³ Yet, a note is sometimes deemed "money."⁴ A specific bequest of a chest does not pass the money in it.⁵

"All of every thing on hand," in connection with a bequest of furniture, &c., will not pass promissory notes and choses in action.⁶

"Ready money" has been held in one case to pass dividends due on stocks, but not rents or interest due on a mortgage.⁷

A bequest of money "to be taken out of such property as the legatee shall think proper" will not entitle him to elect to go on the realty.⁸ But, if the legatee has an unlimited choice as to the quantity of interest he may take, he can appropriate the whole property in question.⁹ Moneys is only equivalent to money, and will denote merely cash, and not things in action.¹⁰

The term "money" in the United States,¹¹ but not in England,¹² passes promissory notes of every descrip-

¹ *May v. Grave*, 5 De G. & Sm. 462; *contra*, *Fryer v. Ranken*, 11 Sim. 55.

² *Grosvenor v. Durston*, 25 B. 97; see *Ommaney v. Butcher*, T. & T. 260.

³ *Beck v. McGillis*, 9 Barb. 35.

⁴ *Richmond v. Vanhoof*, 3 Ired. Ch. 581.

⁵ *Smith v. Jewett*, 40 N. H. 513; see *Richmond v. Vanhook*, 3 Ired. Ch. 581.

⁶ *Young v. Young*, 3 Jones Eq. 216.

⁷ *Fryer v. Ranken*, 11 Sim. 55.

⁸ *Fisk v. Cushman*, 6 Cush. 20.

⁹ *Garrison v. Eborn*, 3 Jones Eq. 228.

¹⁰ *Mann v. Mann*, 14 Johns. 1; see *Beck v. McGillis*, 9 Barb. 35.

¹¹ *Morton v. Perry*, 1 Met. 446.

¹² See *Roberts v. Kuffin*, 2 Atkin, 113; *Mann v. Mann*, 1 Johns. Ch. 231.

tion, money in bank¹ and stocks, if the testator has no other personalty.² "Goods and moveables" may comprise money or bonds.³ "Rents in arrear" may comprise rents received, if termed rents in memoranda allocating them to the legatee.⁴

A gift of securities for money passes bills, notes, stock in the public funds, railway debentures, and probably also shares in joint-stock companies, in the United States. A gift of "securities for money" or "mortgages" will also pass all the beneficial interest in mortgages.⁵ It was held, however, by Kindersley, V. C., *in re* Cautley,⁶ that a bequest of "money on securities" does not pass the legal estate in a mortgage. If the legatee has any active duty to perform, indeed, in realizing the amount due, he will be deemed to take the legal estate,⁷ and the general residuary clause will pass the legal estate in a mortgage even in England,⁸ and will operate as the execution of a power.⁹

A mortgage will pass under a bequest of personalty any time prior to the foreclosure becoming absolute.¹⁰ A bequest of the principal of a bond does not pass the interest due.¹¹

A bequest of the interest of a certain sum, no fund being allocated to that purpose, is equivalent to an annuity,¹² and "interest and dividends" in the

¹ *Dabney v. Cottrell*, 9 Grat. 572.

² *Chapman v. Reynolds*, 6 Jur. N. S. 440.

³ *Jackman v. Robinson*, 1 Yates, 101.

⁴ *Wadsworth v. Ruggles*, 6 Pick. 63.

⁵ *Hawkins on Wills*, 49; *Knight v. Robinson*, 2 K. & J. 503.

⁶ 17 Jur. 124; see *Renwize v. Cooper*, Mad. & Geld. 371.

⁷ *Re Arrowsmith's Trusts*, 4 Jur. N. S. 1123; see *Re Caldclugh's Trusts*, 19 L. T. N. S. 377.

⁸ *Stevens Will Law Rep.* 6 Eq. 597.

⁹ *Bangs v. Smith*, 98 Mass. 270.

¹⁰ *Fay v. Cheney*, 14 Pick. 399.

¹¹ *Stultz v. Keser*, 2 Ired. Eq. 538; *Richmond v. Vanhook*, 3 Ired. 581.

¹² *Swett v. City of Boston*, 18 Pick. 123; see, however, *Routh v. Ammerman*, 4 Bradf. 129.

funds will comprise dividends due at testator's decease.¹

A bequest of debts passes bonds, the period for fulfilling the conditions of which has expired.² A bequest of any money which the testator might die possessed of was held, in *Petty v. Wilson*,³ to include money due on a policy on testator's life. But, it is doubtful whether this decision would be followed in America. However, under a bequest of "whatever debts shall be due me at my decease," a bill of exchange and a cash balance in the hands of testator's banker will pass.⁴

Certain terms are sometimes construed rigidly enough in America. Thus, although a mortgage passes under a bequest of personalty any time before the mortgage becomes absolute,⁵ yet money does not pass a debt, a mortgage does not pass a contract for sale,⁶ and a bequest of the interest of a certain sum is not equivalent to an annuity, if a fund is specified, though an indefinite gift of dividends gives the absolute property in stock,⁷ a watch is not comprised in the phrase wearing apparel, and interest does not pass by a bequest of the principal of a bond.⁸

Utensils will not pass plate or jewels, but "stock of a farm" will include growing crops.⁹

Canal shares are not "securities."¹⁰ The phrase "shares or interest," will not carry a policy of insurance in the company named.¹¹

¹ *Shore v. Weekly*, 13 Jur. 1022.

² *Essington v. Vashon*, 3 Mer. 434.

³ Law Rep. 4 Ch. App. 574.

⁴ See 2 Wms. Exrs. 2d Am. ed. c. 2, § 4, p. 854, *et seq.*

⁵ *Fay v. Cheney*, 14 Pick. 399.

⁶ *Beck v. McGillis*, 9 Barb. 35.

⁷ See 2 Wms. Exrs. 2 Am. ed. c. 2, § 4, p. 854, *et seq.*

⁸ *Sultz v. Kiser*, 2 Ired. Eq. 538.

⁹ 6 East, 604 n.

¹⁰ *Huddleston v. Goldsbury*, 11 Jur. 464.

¹¹ *Harrington v. Moffatt*, 4 De G. M. & G. 1.

Bound manuscripts will pass under a devise of books.¹ Books, however, sometimes pass under a bequest of copyright, and not under a residuary gift of books on hand. Chancellor Kent bequeathed the copyright of his Commentaries, with the right of renewal of all previous and future editions. The residuary clause comprised unsold Commentaries on hand. At the date of the will the Chancellor had some Commentaries on hand, which were sold before he died. A new edition, which was in course of being printed when he died, was held to pass under the specific and not under the residuary bequest.²

An exception to a bequest will, as a rule, enlarge the bequest to mean all things answering to the description, except the thing excepted. The case of *Fleming v. Brooke*,³ which militates to the contrary, as regards choses in action, is highly technical, and is contradicted by other decisions. It would probably not be followed in America.⁴

"Residue" sometimes means not the remainder of the whole personalty, but what is left of a particular fund after satisfying certain special gifts.⁵ But, the meaning of the word "residue" will not be usually thus curtailed. On the contrary, terms of limited meaning, such as goods, money, &c., will frequently pass the residue.⁶

A residuary bequest carries not only what has not been specially disposed of, but also what lapses, or has

¹ *Willis v. Curtois*, 1 Beav. 189.

² *Hone v. Kent*, 6 N. Y. 380; reversing s. c. 11 Barb. 315; see Part I, p. 164.

³ 1 Sch. & Lef. 318.

⁴ See *Hotham v. Sutton*, 15 Ves. 319; Sumner's note.

⁵ 1 Jarm. 702.

⁶ See 1 Jarm. 703, *et. seq.*

been sought to be conveyed by a void legacy.¹ A residuary disposition of realty and personalty," not hereinbefore specifically disposed of," will comprise specific legacies that have lapsed, the word "specifically" being construed "particularly."² But, where a portion of a residuary clause fails, the property lapses, and does not fall into the remaining residue. It is not likely that this rule will be acted on in America. There is no more reason for the exclusion of the lapsed share of one residuary legatee from the residue of the other residuary legatees than there is for the exclusion of a particular lapsed legacy from the general residue. Neither instance, however, affords any fulcrum for the application of extrinsic evidence.

A residuary bequest is sometimes essentially a particular legacy and is so construed. As such, it will only abate rateably with other particular legacies on a deficiency of assets.³

¹ *James v. James*, 4 Paige, 115; *Gore v. Stevens*, 1 Dana, 201, 206; *Hart v. Marks*, 4 Brad. 161.

² *Roberts v. Cooke*, 16 Ves. 451.

³ *Dyose v. Dyose*, 1 P. Wms. 305.

CHAPTER V.

DEVISES OF REALTY.

A devise of land to A. gives him only a life estate,¹ unless a local statute provides to the contrary. But a devise to A. with any words of perpetuity, such as "forever," or "to him and his blood," or "to him and his successors," will give him a fee.² Words of perpetuity in a devise are thus tantamount to words of limitation.³ Accordingly, a succession of life estates is sufficient to indicate a general intention to give a fee tail.

In those States that have not legislated expressly upon the subject the old rule prevails. But it will probably be neutralized by slighter evidences of intention to the contrary in the will than are requisite in England. If, however, the context leaves the question uncertain, the presumption in favor of the heir must prevail, and the devisee will be held to take only for life or a limited interest. Parol evidence is wholly inadmissible to determine this question, notwithstanding what Sir James Wigram has stated in his Fifth Proposition.

The rule that a general devise of land gives⁴ the devisee only a life estate has been abrogated by statute in South Carolina and in Massachusetts as to wild or

¹ *Newton v. Griffith*, 1 Har. & G. 111; *Wheaton v. Andress*, 23 Wend. 452.

² *Beall v. Holmes*, 6 Har. & J. 205; *Johnson v. Johnson*, 1 McMul. (S. C.) Eq. 346; *Cooke v. Husbands*, 11 Md. 492.

³ *Denn v. Gaskin*, 2 Cowp. 660.

⁴ St. 1824. *Whaley v. Jenkins*, 3 Des. Eq. 80.

uncultivated lands,¹ in New York,² Ohio, 1834; New Jersey, 1784; Virginia, 1787; Vermont, 1839; Kentucky, Alabama, South Carolina, North Carolina, Maryland, Tennessee, Mississippi, and Missouri. In these States a general devise of land is now presumed to pass a fee if the context is silent on the point.³

The rule of the common, or rather equitable, law that a devise of land conferred only a life estate has been reversed in England by, 1 Vict. c. 26, § 28, and a natural rule of construction substituted instead. In those states that have a similar law, a general devise will now pass the fee, if the context is not adverse, and the statutory presumption will not be negatived by the grant of an annual allowance for repairs.⁴

It is greatly to be regretted that a change similar to that effected by the Revised Statutes of New York⁵ has not been adopted by all the States, and a devise of land been held to denote the fee, unless the context speaks to the contrary. For, though the American courts will probably exclude the old English rule on less grounds than would have moved the English judges to such a construction prior to 1 Vict. c. 26, yet that old rule is still productive of violence to the testator's intent in many cases. The rule itself is almost always opposed to the testator's wishes, and unless he indulges in what may appear to him to be surplusage, the intended beneficiary may get only a portion of the benefit designed for him. There is obviously more reason for abolishing this rule than the almost equally perplexing rule in

¹ *Sargeant v. Towne*, 10 Mass. 303.

² Rev. Stat. vol. I, 748, § 1; Id. vol. II, 57, § 5.

³ Lomax's Digest, vol. III, 177; see, further, *Fay v. Fay*, 1 Cush. 93; *Ellis v. Essex Merrimack Bridge*, 2 Pick. 243; *Wilent v. Calnan*, 98 Mass. 75; *Payton v. Smith*, 4 McCord, 476.

⁴ *Fuller v. Yates*, 8 Paige, 325; 4 Kent Com. 535 *et seq.*

⁵ Vol. I, 748, § 1; Id. vol. II, 57, § 5.

Shelly case, as applied to wills, since the use of the phrase "heirs of the body" implies some technical knowledge on the part of the testator or his adviser. In many of the American States the English rules of testamentary construction, as existing prior to 1 Vict. c. 26,¹ have been unaltered by statute. In Massachusetts, however, "all the residue and remainder of my real estate" always passed a fee.² So, if the devisee was personally charged with the payment of money to a third person.³ And where the value of the estate was estimated by the testator as nearly that of the fee, it was held to pass.⁴ Similar rules doubtless prevail in all the States that have not yet abandoned the old rule, which construes a general devise of land to confer only a life estate.

A devise of uncultivated land carries the fee, because the cost of clearing it is equivalent to a charge of debts, and there is no income to be derived from the use of such land.⁵ The condition of the land in such cases may be proved by parol in aid of the construction. Any English case decided prior to 1 Vict. c. 26 that gave the devisee a fee will be followed here. But, the American courts will in most cases of a doubtful nature deal more liberally with the devisee than the English courts would have done prior to the act mentioned, although our courts will not treat the rule in question altogether as lightly as they do the rule in Shelley's case.⁶

In those States which have not altered the old testamentary rules of construction, the heir can only be disinherited by plain words of devise or else by neces-

¹ 2 Redfield on Wills, 335.

² *Parker v. Parker*, 5 Met. 134; *Godfrèy v. Humphrey*, 18 Pick. 537.

³ *Tracy v. Kilborn*, 3 Cush. 557.

⁴ *Baker v. Bridge*, 12 Pick. 27; see *Cook v. Holmes*, 11 Mass. 528.

⁵ *Sargent v. Towne*, 10 Mass. 303; *Russell v. Elden*, 3 Shep. 193.

⁶ See *Beale v. Holmes*, 6 Har. & J. 205; *Lindsay v. McCormack*, 2 Marsh, 229; *Smith v. Poyas*, 1 Des. 156.

sary implication.¹ A devise of land, therefore, in such States to A. gives him only a life estate. Under a devise to the heir, he also takes here by descent, as in England before the passing of the Inheritance Act. But, if the estate given to the heir differs from the interest he would take by descent, he will take under the will by purchase.²

In those States where statute law has not altered the old doctrine, it has been but little modified by construction, and in such States, if there is any doubt as to whether the will contains words of limitation or of an equivalent nature, the common law rule will generally be applied, and the devisee will only take for life. For, heirs are favored in law, and get the benefit of any doubt affecting their rights.³

Most of the leading cases on wills are each so peculiar in its circumstances that very little reliance can be placed on a precedent, unless it is exactly in point, which, indeed, rarely or never occurs. In Pennsylvania, the English rules have been adopted as they existed prior to 1 Vic., c. 26.⁴ Therefore, in that State, a devise of land gives only an estate for life; but, on the other hand, any word importing in any way the fee will

¹ *Roosevelt v. Heirs of Fulton*, 7 Cow. 71; *Jackson v. Burr*, 9 Johns. 104.

² *McAfee v. Gilmore*, 4 N. H. 391; *Fogg v. Clark*, 1 N. H. 163; *Enlaws v. Enlaws*, 3 Marsh, 228.

³ See *Roberts v. Ogbourne*, 37 Ala. 174; *Parish v. Parish*, Id. 591; *Cleveland v. Spilman*, 25 Ind. 95; *Lewis v. Smith*, 6 Jones, Eq. 347; *Burke v. Chamberlain*, 22 Md. 308; *Ferris v. Smith*, 17 Johns. 221; *Olmstead v. Olmstead*, 4 N. Y. 56; *Shutt v. Rainbow*, 57; Penn. St. 149; *Bacon's Appeal*, Id. 504; *Turner v. Kittrell*, 1 Winst. Eq. 39; *Doe v. Dill*, 1 Houston, 398; *Physick's Appeal*, 50 Penn. St. 128; *McKenzie v. Jones*, 39 Miss. 234; *Steiner v. Koll*, 57 Penn. St. 123; *Quillman v. Custer*, Id. 125.

⁴ See *Hall v. Dickinson*, 31 Penn. St. 94; *Naglee's Appeal*, 33 Penn. St. 89; *McKee v. McKinley*, 33 Penn. St. 92; *Musselman's Estate*, 39 Penn. St. 469.

pass it. In that State, however, a condition, that, if a devisee died unmarried or without issue, his interest should revert to the general estate, has been held not to prevent the devisee from taking the fee where the land was charged with debts and annuities.¹

Even prior to 1 Vict., c. 26, § 28, a direct or contingent charge of debts implied in England that the devisee took a fee, no matter how small the debts were.² This rule obtains in those States which have not passed any act analogous to 1 Vict., c. 26. A distinction also prevails in these States between a charge on the person of the devisee and one on the land in respect to the point now under review. A charge of the former kind implies a fee in the devisee, but a charge of the latter kind implies only a feehold.³ This presumption, however, is not universally recognized in America as conclusive.⁴

Where a charge is imposed on the person of a devisee, and not merely on his land, if the devisee did not take the fee, the gift might be to him a source of loss and not a gain. But, where the charge is confined to the land, this is quite consistent in all cases with the devisees only taking a life interest.⁵ As the principle of these rules is that a different construction might entail loss and not gain on the devisee, therefore, any other condition as that the devisee shall convey his own fee to J. S. gives him the fee in the land devised to him, if the context implies nothing to the contrary.

¹ *Schoomaker v. Stockton*, 37 Penn. St. 461.

² 2 Jarm. 248.

³ *Fox v. Phelps*, 17 Wend. 393; *Jackson v. Merrill*, 6 Johns. 185; *Jackson v. Bull*, 10 Id. 148; *Jackson v. Martin*, 18 Id. 31.

⁴ *Lithgow v. Havenagh*, 9 Mass. 165.

⁵ *Wright v. Page*, 10 Wheat, 204; see *Ferguson v. Zepp*, 4 Wash. C. Ct. 645.

*Gibson v. Horton*¹ is to that effect. A devise for life, with power to convey or devise the fee, does not come within the principle stated, and gives the devisee only an estate for life.² He also takes only for life, if the incumbrance or annuity is merely a charge on the land,³ or the land is only devised subject to it. For, in such circumstances, the land may possibly never be resorted to by the owner of the charge. The devisee gets only a life estate if the gift is to him after payment of the charge. For, owing to the distinctness in this case between the charge and the devise, the charge throws no light on the quantity of interest intended to be devised by the testator.

If there is a devise, though it be only for life, over, on the death of the devisee under age or under age and without issue, this enlarges the devise to a fee by implication.⁴ But a different construction obtains, if the ulterior limitation is not connected with the death of the first devisee.⁵

If the first devise is in fee, and the limitation over, whether in the same will or in a codicil, is general, the ulterior grantee takes only for life, according to the rule which deprives an heir of his common law rights only so far as is absolutely necessary to give some effect to the words of the will.⁶ But a devise to A. in trust for B. in fee, or to A. in fee in trust for B., gives both A. and B. fees at law and in equity respectively,⁷ especially if the general purposes of the trust imply that the trustees take a fee.⁸

¹ 5 Har. & J. 177.

² See *Doe v. Howland*, 8 Cow. 277.

³ 2 Jarm. 251; *Andrew v. Southouse*, 5 T. R. 292; *Burton v. Powers*, 3 Kay & J. 170; *Denn v. Mellor*, 1 B. & P. 247.

⁴ 2 Jarm. 250; *Frogmorton v. Holyday*, 3 Burr. 1618.

⁵ *Roe v. Blackett*, 1 Cowp. 235. ⁶ *Roe v. Holmes*, 2 Wils. 80.

⁷ *Challenger v. Shepherd*, 8 T. R. 597; *Shaw v. Weigh*, 2 Str. 798.

⁸ *Knight v. Selby*, 3 M. & G. 92; see *infra* chapter 15, "Limitations to trustees."

A charge of debts which may be paid out of the personalty, will not give a fee by implication in America.¹ But a charge equal to half the value of the land is sufficient to pass a fee.² So is a charge for the purpose of supporting testator's mother.³ But an express estate for life is not enlarged by a charge for debts.⁴ In *Barheydt v. Barheydt*,⁵ the devisee, being required to give money to another, was held to have taken the fee.

Where a testator charges a devisee with the payment of debts and legacies, the charge attaches to the estate⁶ also.

The rule that a devisee of land takes only an estate for life, where there is no statute on the point, is a rule of construction, and not of law. Therefore, other expressions in the context may enlarge the estate of the devisee to a fee. No technical word or phrase, such as "heirs," is requisite, for in a will a fee may be conveyed by such words as "estate," "for ever," "property," "real effects," "inheritance," "reversion," (but not "remainder,") "in fee simple," "to him and his executors," "all I am worth," "all right and title," "I make him my heir," "to do what he likes with it," &c.⁷ The word "residue" was held in *Rathbone v. Dyckman*,⁸ to carry the fee. Even a devise of my estate at A. will pass a fee, although the word estate, when used in connection

¹ *Jackson v. Harris*, 8 Johns. 141; *Jackson v. Babcock*, 12 Johns. 389; *Tanner v. Livingston*, 12 Wend. 83; *Heard v. Horton*, 1 Denio, 165;

² *Fox v. Phelps*, 20 Wend. 437.

³ *Jackson v. Martin*, 18 Johns. 31.

⁴ *Tanner v. Livingston*, 12 Wend. 83; see *Merritt v. Brantley*, 8 Fla. 226; *Henry v. Gorterman*, 1 Met. (Ky.) 465.

⁵ 20 Wend. 576.

⁶ *Sands v. Champlin*, 1 Story C. Ct. 376.

⁷ *Baker v. Raymond*, And. 51; *Jenkins v. Lord Clinton*, 26 Beav. 108. 121.

⁸ 3 Paige, 9.

with locality, indicates a material and not a legal interest.¹ The original rule of the common law, however, being unsound, it is sought to be cured by the courts by means of an equally unwarranted straining of slight expressions in the context so as to give the devisee the fee.²

A devise of the rents of an estate will pass the fee,³ on account of the use of the word "estate," which always passes a fee, except when the word is obviously used as synonymous with a previous limited gift,⁴ or is inconsistent with other limitations in the context.⁵

A devise of premises in fee to A., with the exception of part thereof to B., gives B. the fee in the excepted part. The rule on this point proves or explains the exception.⁶ A like principle applies to estates given in the alternative or upon condition.⁷

A devise of land without words of perpetuity will also pass the fee if the introductory clause and frame of the will show that the testator intended to dispose of all his property.⁸

In Ohio, a devise of "the plantation on which I now live," has been held to pass the fee. And yet, prior to the change in the law made by the Revised Statutes of New York, a devise to testator's widow for life, and on her death the land to be "equally divided" between

¹ 2 Redf. 328.

² *Fox v. Phelps*, 17 Wend. 393; s. c. aff'd, 20 Wend. 437; *Earl v. Grim*, 1 Johns. Ch. 494; *Van Derzee v. Van Derzee*, 30 Barb. 331.

³ *Stewart v. Garnett*, 3 Sim. 398; *Craig v. Craig*, 3 Barb. Ch. 76; *Patterson v. Ellis*, 11 Wend. 259; *Smith v. Post*, 2 Edw. 523.

⁴ *Doe d. Clayton*, 8 East, 141; *Doe d. Clarke*, 1 Cr. & Mees. 39.

⁵ *Key v. Key*, 4 De G. M. & G. 73; *Martin v. McCausland*, 4 Ir. Law, 340.

⁶ *Doe d. v. Lawton*, 4 Bing. N. C. 455.

⁷ See *Greer v. Armsteed*, Hob. 65; *Shaillard v. Baker*, Cro. Eliz. 774; *Bentley v. Oldfield*, 19 Beav. 225.

⁸ *Vanderzee v. Vanderzee*, 36 N. Y. 231; compare with this case *Van Dyke v. Emmons*, 34 Id. 186.

testator's two sons, was held to give the sons only life estates.¹

In some of the States the terms "property" and "estate" have not been construed as liberally as in England, where standing alone they always passed the fee.² But a devise of land for a permanent purpose—as to establish schools, passes a fee, on the ground, probably, that the legal estate is always commensurate with the trust intended to be raised thereout.³

In *Jackson v. Housel*,⁴ a fee was held to pass under the phrase, "My property, after my debts are paid, I leave and bequeath to my beloved wife, and wish her to educate my daughters." A devise of the use for life, with a power of appointment, was held to give the fee in *Jackson v. Coleman*;⁵ the rule is different if the power is to dispose of by will only.⁶ A charge also, of course, often enlarged the devisee's estate to a fee in New York before the passing of the Revised Statutes.⁷ As to the effect of ulterior limitations in limiting the quantity of interest of the particular tenant, see *Bradley v. Cartwright*.⁸

A. devised to his son an estate, W., "to do and dispose of as he may think proper." By a subsequent clause he devised estate H. without words of limitation. The will also directed the son to pay certain legacies. A further clause devised all the estate of the testator to

¹ *Edwards v. Bishop*, 4 N. Y. 61; s. p. *Jackson v. Bull*, 10 Johns. 148; *Liffen v. Eldred*, 2 Barb. 130.

² *Pippin v. Ellisop*, 12 Ired. 61; *Hurdle v. Outlaw*, 2 Jones Eq. 75; see *Clark v. Hyman*, 1 Dev. 382.

³ *Bell County v. Alexander*, 22 Texas, 350; see *infra*, chapter fifteen.

⁴ 17 Johns. 281; compare *Wheaton v. Andress*, 23 Wend. 452.

⁵ 2 Johns. 391.

⁶ *Doe v. Howland*, 8 Cow. 277.

⁷ *Dumond v. Stringham*, 26 Barb. 104.

⁸ Law Reps. 2 C. P. 511.

his wife during her widowhood. It was held that the son took a fee in both estates.¹

In *Lippett v. Hopkins*,² the devise was to A. "and if he shall die without an heir before he shall arrive at the age of twenty-one years, then all that is to him herein bequeathed, to be equally divided amongst his brothers and sisters, or their heirs." It was held that A. took a fee simple, with an executory devise over to his brothers and sisters. The report of this case contains rules for construing devises without words of limitation, and enumerates the leading cases on this point.

In *Abbott v. Essex County*,³ the devise was "if either of my sons, John and Jacob, should happen to die without any lawful heirs of their own, then, the share of him who may first decease, shall accrue to the other survivor and his heirs." The court held that this devise provided for a definite failure of issue, and that, by way of executory devise, the share of the son first dying without issue in the life-time of the other, was to go over to that survivor, and that, subject to this contingency, each took a fee simple.

A devise to testator's wife, "for her use and comfort, and to be disposed of as she pleases, at or before her decease, when no doubt she will make such disposition of the same among our children, as she may then think most proper," has been held to give the wife a fee simple, without any trust for the children.⁴

Jarman considers that where there is a devise of both realty and personalty to trustees, but the trusts declared relate only to the personalty, there is a resulting trust of the realty to testator's heir. But this is very doubt-

¹ *King v. Ackerman*, 2 Black. 408.

² 1 Gall. 454; 1 St. Circ. (R. I.) 1813.

³ Circ. Mass. 1854; 2 Curt. C. Ct. 126.

⁴ *Kenter v. Jenks*, 43 Penn. St. 445.

ful. It would hardly be so decided in America. The case of *Dunnage v. White*,¹ cited by Jarman, is not really any authority in behalf of the proposition advanced by him. In such cases, the trustees most probably take a fee, and the trusts, too, are charged by implication on the realty. This question will be more fully discussed, *infra*, in chapter fifteen, on "Limitations to Trustees."

In *Engliss v. Sailors' Snug Harbor*,² a testatrix devised "all her estate, real and personal, wheresoever and whatsoever, in law or equity, in possession, reversion, remainder, or expectancy, unto her executors, and the survivor of them, his heirs and assigns, for ever," upon certain designated trusts. It was held, that under the Statute of Wills of New York, all the rights of the testatrix to real estate, held adversely at the time of her decease, passed to the devisees.

A devise without words of inheritance, but directing that if any of the testator's heirs, of whom the devisee was one, should die without lawful issue, his part should be equally divided between the survivors, implies that in case of issue these would take, and thus passes a fee.³ In *Dumond v. Stringham*,⁴ a provision that if the devisee should die during the widowhood of the testator's wife, she should have the property during her widowhood, and no longer, was held not to be inconsistent with an intention to devise a fee. It was held, in *Wright v. Page*, that "tenement" does not pass a fee.⁵

In *Pocock v. the Bishop of Lincoln*,⁶ a testator

¹ 1 Jac. & Walk. 583; see 1 Jarm. 680, note.

² 3 Pet. 99.

⁴ 26 Barb. 104.

⁵ 3 Br. and B. 27.

³ 18 Johns. 368.

⁶ 10 Wheat. 204.

devised to his son the "perpetual advowson" of the living then held by the son. It was held that the son only took a life interest, and that the word "perpetual" related to the quality, not the quantity, of the estate devised. If the son vacated the living or was translated to a see, doubtless the will would then operate. The case would palpably have been one to be elucidated by parol evidence if such could be admitted to explain the quantity of interest intended to be given. The phrase perpetual advowson, however, does not carry the fee if the bequest is to a stranger; and the question was whether the fact that the donee had already a life interest should affect the construction. It must be admitted that the case can be supported on strict principle.

Unless the intention to give a fee is *plain*, such an estate will not pass.¹ The American law thus favors the heir by analogy to the common law rule. Therefore a devise to the testator's wife of "all the rest" of his lands, &c., has been held to give her only a life estate.² This ruling, however, it must be confessed, is worthy of the era of *Perrin v. Blake*.³

So in *Shriver v. Lynn*,⁴ the devise was to the testator's brother "E. M., during his natural life, of 100 acres of land. In case he should have heirs lawfully begotten, I then give and bequeath the 100 acres of land to him, the said E. M., his heirs and assigns forever." It was held that E. M. took a life estate only, which, on the happening of the contingency, might be converted into a fee simple, and not a conditional fee.

In *Page v. Wright*⁵ the devise was "to M. of all the rest of my lands and tenements whatsoever, whereof I

¹ *Wright v. Page*, 10 Wheat. 204.

² *Ib.*

³ 4 Burr. 2579.

⁴ Supreme Ct. 1844, 2 How. 43.

⁵ 4 Wash. C. Ct. 194, 3d Circ. (N. J.) 1822.

shall die siezed in possession, reversion or remainder, provided that she has no lawful issue. Item—I give to M., whom I also make my sole executrix, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed.” It was held that M. took an estate for life only. Yet, the superabundance of general words here, and the implied provision for M.’s issue, denoted an intention to pass a fee.

E.,¹ being seized of lands in the State of New York, devised the same to his son Joseph in fee, and other lands to his son Medcef in fee, and added, “It is my will that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, then I give all the property to my brother John E. and my sister Hannah J., and their heirs.” Joseph, one of his sons, died without lawful issue in 1812, leaving his brother Medcef surviving, who afterwards died without issue. It was held that Joseph took an estate in fee, defeasible in the event of his dying without issue in the lifetime of his brother, and that the limitation over was good as an executory devise, and on the death of Joseph vested in the surviving brother Medcef.

Under the decisions of the Courts of New York,² such a devise does not vest in A. and B. an estate tail liable to be converted into a fee simple absolute by the statute of 1786. The limitation over is good as an executory devise, and A. and B. each take an estate in fee, defeasible in the event of either dying without issue in the lifetime of the other.

Under a devise of all the estate called Marrowbone,

¹ Supreme Ct. 1827, *Jackson v. Chew*, 12 Wheat. 153; followed, 1828, in *Waring v. Jackson*, 1 Pet. 570.

² 1 Johns. 440; 3 Id. 229; 10 Id. 12; 11 Id. 337; 16 Id. 382; 20 Id. 483.

in the County of Henry, containing, &c., likewise one other tract of land in said county, called Horsepasture, containing, &c., it was held, on the general tenor of the will, that a fee passed.¹

For the principles which determine whether a devisee takes a fee simple or a fee tail, see *Lillibridge v. Adie*.²

Where a devisee whose estate is not defined is directed to pay debts, legacies or a sum in gross, he takes the fee.³

In *Hardy v. Redman*⁴ on a devise to the testator's executor in trust, to apply the income to the support of the widow, with power to sell the estate if the income should not be sufficient, the devisee was held to take a fee. A power of sale, however, attached to an express life estate, will not enlarge it to a fee.⁵

If the absolute interest is once clearly given, a limitation over will be void. But the words "heirs and assigns" do not necessarily prove that the absolute interest was meant to be given.⁶ If, however, the first legatee has absolute power of disposition, and the limitation over applies only to any residue undisposed of by the first legatee, and not to the whole interest, the generality of the first limitation will not be cut down to mean a limited interest, but will pass the absolute property, and the limitation over will be void.⁷ Of course, if the limitation over is not necessarily repugnant, but is limited on the event of the first taker dying under age

¹ Supreme Ct. 1805, *Lambert v. Paine*, 3 Cranch. 97.

² 1st Circ. (R. I.) 1816; 1 Mas. 224; *Arnold v. Buffum*, 2 Mas. 208, (Mass.) 1854; 1st Circ. (R. I.) 1854; *Crane v. Cowell*, 2 Curt. C. Ct. 178.

³ Supreme Ct. 1862, *King v. Ackerman*, 2 Black. 408.

⁴ 3 Cranch. C. Ct. 635; C. Ct. D. C. 1829.

⁵ 1 Dean v. Nunally, 36 Mass. 358.

⁶ *Woodham v. Maverick*, Vol. II. Law Mag. 487.

⁷ *Pinckney v. Pinckney*, 1 Brad. 269; *Ferris v. Gibson*, 4 Edw. 707.

and without issue, or on any other contingency within the line of perpetuity, this ulterior limitation is a valid executory gift.¹

If an estate be given to a person generally, with power of disposition, this is a fee. But if it be to him for life, with power to dispose of the remainder, he only takes an actual estate for life,² although by the exercise of his power he can appoint to himself in fee.

A devise of rents and profits has been often held to be equivalent to a gift of the land.³ The phrases land and rents and profits, however, may possibly be held not to be, coterminous in some of those States where, as in England, a general devise of land now passes the fee. For a devise of the rents and profits of certain farms may possibly be held to give the devisees only life estates, though, if the devise was of the land itself, they would take the fee.

A direct devise of rents and profits, however, has already been decided in New York to be exactly equivalent to a devise of the land itself,⁴ and will carry both the legal and beneficial interest therein to the extent that a devise of the land would do, since the passing of the Revised Statutes. Therefore, a devise of rents and profits there means a fee. Prior to the period mentioned, or if the "rents and profits" are given for a limited period only, they will, of course, denote only a limited interest.⁵

"Income" is "equivalent to" rents and profits.⁶ So are the words "use and improvement."⁷

¹ *Trustees of Theo. Se. v. Kellogg*, 16 N. Y. 83.

² *Jackson v. Coleman*, 2 Johns. 391; *Jackson v. Robins*, 16 Ib. 537-588.

³ *Doe d. Goldin v. Lakeman*, 2 B. & Ad. 30; *Stewart v. Garnett*, 3 Sim, 398.

⁴ *Reed v. Reed*, 9 Mass. 372; *Anderson v. Greble*, 1 Ashm. 136; *Fox v. Phelps*, 17 Wend. 393; *Earl v. Rowe*, 35 Me. 419, 420.

⁵ *Fox v. Phelps*, 17 Wend. 393-402.

⁶ *Butterfield v. Haskins*, 33 Me. 392.

⁷ *Fay v. Fay*, 1 Cush. 93.

"Net profits" mean "rents and profits" or the land itself.¹

When the devise relates directly to "rents and profits" there is rarely any difficulty. This, however, sometimes arises with respect to the meaning of the phrase when the rents and profits are directed to be applied to the raising of a charge. The early cases confined such a charge to the annual rents and profits; but the modern cases incline to authorizing a sale, especially if the payment of the charge is not deferred, but is immediate.²

There is no doubt that a trust to raise a charge out of the rents and profits to pay debts at once has always constituted a specific lien on the land itself, and will authorize a sale thereof.³ *A fortiori* if the trust is secured by a term,⁴ although, of course, the context may cut down the meaning of the phrase to denote merely annual rents and profits, notwithstanding the creation of a term to support the charge.⁵

The context or the circumstances of the testator may also show that the phrase "rents and profits" means the land itself, and where a testator directed renewal fines of leases to be raised out of the rents and profits, a sale was directed.⁶

But if the immediate payment of the charge, even if it be for legacies, is not required, the phrase will be sometimes held to mean, according to its grammatical sense, only annual rents and profits.⁷

¹ *Earl v. Rowe*, 35 Me. 414.

² See *Schermerhorn v. Schermerhorn*, 6 Johns. Ch. 70.

³ *Green v. Belcher*, 1 Atk. 506; *Trafford v. Ashton*, 2 P. W. 415; *Allan v. Backhouse*, 2 V. & B. 64; *Bootle v. Blundell*, 1 Mer. 232; *Wilson v. Halliley*, 1 R. & My. 590; *Lingen v. Foley*, 2 Ch. Cas. 205.

⁴ *Bootle v. Blundell*, 1 Mer. 232; *Trafford v. Ashton*, 1 P. W. 415.

⁵ *Heneage v. Lord Andover*, 3 Y. & J. 360.

⁶ *Allan v. Backhouse*, 2 V. & B. 64.

⁷ *Small v. Wing*, 5 Bro. P. C. Toml. 66; *Heneage v. Lord Andover*, 3 Y. & J. 360.

A bequest of an annuity or rent charge, not existing previously, confers only an interest for life, in England, even since 1838 (1 Vict. 26, § 28). However, if the rent charge or annuity be given to A. during the life of B., and A. dies before B., A.'s executor will still receive the annuity during B.'s life.¹ But if a fund, such as public stocks, be mentioned as the source of the annuity, it is then perpetual. See *Wilson v. Madison*² as to the distinction between a charge on a fund and a gift thereof.

“A gift, then, of the produce of a fund, whether particular or residuary, without limit as to time, is a gift of the fund itself.”³ So, also, is a limitation of an annuity to one for life remainder over. The remainder man takes a perpetual annuity.

¹ *Savery v. Dyer*, Amb. 139.

² See 2 Y. & C. C. C. 372.

³ *Stokes v. Heron*, 12 Cl. & Fin. 161.

CHAPTER VI.

THE RULE IN SHELLEY'S CASE.

The Rule in Shelley's Case,¹ is an exception to the third class of contingent remainders described by Fearne.² The rule transmutes their nature, and changes them into vested interests in different persons from those designed by the grantor. The judges in early times, with their usual tendencies to construe interests as vested, considered that it was better to give a certain interest to the ancestor than an uncertain one to the heir, when the construction of the deed of gift admitted of the alternative. Hence arose the rule in Shelley's Case, as it is termed, that when a freehold is given to one, and by the same gift a limitation is made to his heirs, the inheritance vests in him and not in his heirs.

The rule may be also thus conversely summarized: heirs take by descent, and not by purchase, when they claim under an instrument in which their ancestors took either expressly or impliedly an estate of freehold of like quality with their own (See *Shapland v. Smith*),³ as to the question whether both estates are of the same quality. The rule will apply in courts of law, even though one of the legal limitations be subject to a trust.⁴ Fearne's opinion⁵ to the contrary is manifestly unsound, as his editor points out.

If the ancestor does not assign the land, it descends

¹ 1 Co. 91.

² 1 B. C. C. 74.

³ Fearne on Con. Rem. 35.

⁴ Fearne on Contingent Remainders, 29.

⁵ Pres. Es. 311.

to his heirs, yet an estate limited to them directly or by purchase, as it is termed, would be more valuable to them than one by descent, inasmuch as an estate of the former description does not lapse by the death of their ancestor in the testator's life-time,¹ and is not subject to his grants, charges, or debts, or the dower or curtesy of his or her consort.

The heirs in both cases alike, however, make title through their ancestor. Hence, an estate to trustees in trust for A., remainder to the heirs of A.'s body, gives to A.'s issue what is termed a *quasi entail*,² although the phrase is more usually found applied to equitable limitations of personalty in tail; or, rather, this latter class of *quasi* entails is the more common species.

A devise to A. and B., husband and wife, for their lives, with remainder to the heirs of their bodies, constitutes them tenants in tail by entireties, to bar which estate both A. and B. should concur. If A. and B. are persons who may lawfully intermarry, but are not actually married, they will be joint tenants in tail, and the survivor will have the *jus accrescendi*, if the deceased joint tenant have not barred his own entail. If A. and B. are two males, or are incapable of legal intermarriage with one another, they are joint tenants for life, with several inheritances in tail.³

The rule in Shelley's Case applies to wills, but its operation may be neutralized by the context, especially in America. The rule is here regarded only as a mere presumptive rule of construction that deserves little favor.⁴ Like the legal presumption in favor of a joint tenancy, it will be acted upon in those States where it

¹ *Hutton v. Simpson*, 2 Vern. 722.

² *Mandeville's Case*, Co. Litt. 26 b.; *Fearne*, Con. Rem. 80.

³ See *Watkins on Conveyancing*, chapter Estates Tail; 2 Jarm. 197-8.

⁴ *Smith v. Hastings*, 29 Vt. 240; *Blake v. Stone*, 27 Vt. 475.

has not been yet abolished by statute or construction, if the context of the will is silent to the contrary; but, even in those States where it is still recognized as an active rule of law, its force will usually be outweighed by the most trivial expression in the will to the contrary.¹ In some cases, no doubt, the English rules are recognized to their full extent.² But the later decisions lean to an abrogation of the rule.

Devises of advowsons or manors and shares in certain companies are, in respect to the rule in question, construed as if they related to land. A devise in tail of unentailable land or of chattels,³ gives a fee conditional, as at common law. Upon birth of issue the ancestor acquires a fee.

The rule in Shelley's Case applies to personalty as well as realty, if the context is not adverse.⁴ But a less emphatic context will preclude the application of the rule in respect to personalty than is necessary, if the entail relates to freehold land.⁵ It is not unusual to find the courts applying different principles of construction to the same limitations of land and chattels. In *Herrick v. Franklin*,⁶ Giffard, V. C., said he would apply those diverse principles to realty and personalty respectively, even though both descriptions of property were thrown into a common or mixed fund by the testator.

A will and codicil, or different codicils, are all one instrument, within the meaning of the rule in Shelley's Case, just as an appointment under a power, and the deed

¹ *Chelton v. Henderson*, 9 Gill, 432.

² *Dott v. Cunninghton*, 1 Bay, 453; *Goodrich v. Lambert*, 10 Conn. 448; *Evarts v. Chittenden*, 2 Day, 338.

³ *Stafford v. Buckley*, 2 Ves. Sen. 130.

⁴ *Ex'rs of Moffat v. Strong*, 10 Johns. 12; *Ellis v. Merrimack Bridge*, 2 Pick. 243.

⁵ *Forth v. Chapman*, 1 P. Wms. 663.

⁶ *Law Rep. 6 Eq. 593*; *contra*, *Dunk v. Fenner*, 2 Russ. & My. 557.

creating the power, constitute but one instrument in law, in respect to the same rule.¹ Butler², Preston,³ and Jarman, vol. II, 181,⁴ consider that an appointment does not bear a sufficiently intimate relation to the deed creating the power to admit of the operation of the rule in Shelley's Case on both instruments conjointly. But Fearn's⁵ opinion to the contrary appears to be much more solid. For appointments are, to all intents, mere uses, having a seisin only under the primary deed. So far as the doctrines of tenure, therefore, as distinguished from gifts, contracts, sales, and the rule against perpetuity, are concerned, all uses executed by the statute, and by analogy all equitable trusts, must be construed by the light of the common law. At common law the seisin of the particular tenant preserved contingent remainders. Why should not the seisin to feoffees or grantees to uses preserve, and conversely be subject to all the requirements of contingent uses, whether raised under a power or by the fulfilment of any other legal contingency?

The rule applies where the term children, issue, sons, &c., is construed to mean heirs of the body, and, conversely, does not apply where the phrase "heirs of the body" is interpreted to denote children or others as purchasers.⁶

The rule received one of its greatest perversions in the celebrated case of *Perrin v. Blake*,⁷ where it was held that the rule applied even though the donee for life was expressly prohibited from aliening the estate for a period

¹ *Hays d. Foorde v. Foorde*, 2 W. Blackst. 698.

² Co. Lit. 299; b.

⁴ 1859, Amer. Ed.

⁶ See *Albee v. Carpenter*, 12 Cush. 382.

⁷ 4 Burr. 2579; 1 W. Blackst. 672.

³ Est. 324.

⁵ Con. Rem. 75.

longer than his life. The English courts, however, are still disposed to maintain the rule in the full spirit of the decision in *Perrin v. Blake*.¹

In America a wholly different construction is adopted. The slightest intimation to the contrary in the will usually prevents the rule from being acted on by our courts in those States where it is still recognized,² while it is expressly abolished in others.

The phrase "heirs of the body" will be one of limitation, even though there be superadded a limitation to the heirs general of the heir of the body. But if the superadded limitation change the course of descent—if, for instance, the limitation be to the heirs female of the heir of the body—then the latter takes by purchase.³

But the rule in Shelley's case will prevail in England in despite of such phrases as "share and share alike," as "tenants in common," or "whether sons or daughters," or "without regard to seniority of age or priority of birth," &c. The law on these points is not yet settled in some of the United States,³ but the tendency of the courts is to reject the application of the rule in all such cases. Indeed, it is safe to say that the rule will not be applied if there is even less emphatic language in the will than the phrases just mentioned. These phrases leave no ground to doubt that the testator intended that the heirs should take by purchase. When they take by descent, the phrases referred to are put to silence, contrary to the general rule of construction that every word in a will is, if possible, to get some force and application.⁴ When land is devised to A. for life, remainder to his heirs, or to the

¹ *Nash v. Nash*, 3 Barn. & Ald. 839.

² *Findlay v. Riddle*, 3 Binn. 139; *Swain v. Roscoe*, 3 Ired. 200,

³ *Shelley's case*, 1 Reps. 91.

⁴ *Supra*, page 33.

heirs of his body, as tenants in common, they cannot possibly take in common if the ancestor takes the whole interest. Yet, strange to say, the rule is still enforced in England in such cases, and Fearne's opinion is in favor of such a construction.¹

Jarman² says of the rule that it "is a rule of tenure, which is not only independent of but generally operates to subvert the intention." Is not this an admission that the rule has been allowed to eliminate a broad area of testamentary discretion, and to subject wills, so far, to the cast-iron shackles of feudal interpretation? But no matter what the rule is, it is its application, and not its own nature, that is in question. Jarman, therefore, is arguing on this point without regard to the real issue.

The operation of the rule is not precluded in England by an estate to trustees to preserve contingent remainders,³ nor by a power to jointure conferred on a tenant for life, which implies that he has not the fee;⁴ nor by the clause "without impeachment of waste,"⁵ or "separate use;"⁶ (though this case, indeed, is not a direct authority on the point;) nor by a declaration that the freehold devisee shall have no power to defeat the testator's intent;⁷ or that the heirs shall take as purchasers.⁸ In *Douglas v. Congreve*,⁹ even a declaration that the limitations were in strict settlement did not prevent the application of the rule. It is morally certain that none of these cases would be followed at the present day

¹ Con. Rem. 80 *et seq.*

² Vol. II, 182.

³ *Coulson v. Coulson*, 2 Stra. 1125.

⁴ *King v. Melling*, 2 Lev. 58.

⁵ *Papillon v. Voice*, 2 P. W. 471.

⁶ *Lady Jones v. Lord Say & Sele*, 8 Vin. Ab. 262, pl. 19.

⁷ *Roe d. Thong v. Bedford*, 4 Mau. & Sel. 362.

⁸ Harg. Law Tracts, 561; 2 Jarm. 183.

⁹ 1 Beav. 59.

in America, but the heirs would be held to take by purchase.

The rule is applied in England more rigorously under wills than its laxity in some respects—even in respect to limitations in deeds—would warrant. For it does not apply where the heir is the joint heir of the freeholder and another.¹ If one person cannot be heir to both as testator intended, then the freeholder takes an undivided entail, and the son of the other takes by purchase. This contingent remainder will of course fail if the particular estate fail previously.

The rule applies to equitable as well as to legal estates. *Bagshaw v. Spencer*,² which decides the contrary, is not law now. But the rule does not apply to trusts executory. For instance, when the testator directs the trustees to buy and settle land or devises land to them, to be afterwards conveyed by them in a more special manner to a person and the heirs of his body, such executory trusts will, as a rule, be construed as if they were contained in marriage articles as distinguished from settlements.³

The case of *Austen v. Taylor*⁴ has been overruled, if, indeed, it ever was an authority for the doctrine that a direction to trustees to buy and settle land differed in its legal effect from a mere direction to buy, the uses being finally declared by the testator. In principle, these two classes of cases are certainly distinguishable. The former are executory trusts; the latter are trusts executed, as regards the limitation of estates, to the

¹ *Gossage v. Taylor*, Sty. 325; see *Lane v. Pannell*, 1 Roll. Rep. 238, 317, 438.

² 1 Ves. Sen. 148.

³ *Leonard v. Earl of Sussex*, 2 Vern. 525; *Lord Glenorchy v. Bosville*, *Cas temp. Talb.* 3.

⁴ Amb. 376.

devises. However, the law in such cases is now settled, and, happily, contrary to the adoption of the rule in Shelley's case.¹

Jarman² thinks that, in these cases, indeed, the words used by the testators, even if standing alone, without any limitation to trustees, would not admit of the operation of the rule. But the case of *Meure v. Meure*³ is much stronger than that, although it must be admitted that its principle is infirm in law though sound in sense. For the rule in Shelley's case has been applied in several cases where there were no trustees, but in which the limitations were exactly analogous to those in *Meure v. Meure*. This case, however, is, on the other hand, hardly distinguishable from *Seale v. Seale*.⁴

In *Bastard v. Proby*,⁵ the direction to the trustees to settle the lands on the heirs of the body "as counsel should advise" was held to preclude the application of the rule. But in *Marshall v. Bousfield*,⁶ under a direction that the land "should be settled by able counsel," it was held that the rule applied. The only inference, nevertheless, to be drawn from these cases, as well as from *Meure v. Meure* or *Jervoise v. Duke of Northumberland*,⁷ is that less emphasis on the part of the testator will preclude the application of the rule in Shelley's case where there is a direction to trustees to buy or to convey than where there is no reference to trustees. The rule, of course, is more freely applied to executory trusts under wills than if the

¹ *Meure v. Meure*, 2 Atk. 265.

² Vol. II, 191.

³ 2 Atk. 265.

⁴ Pre. Ch. 421; s. c. 1 P. W. 290, and *Blackburn v. Staples*, 2 Ves. & Bea. 367.

⁵ 2 Cox, 6.

⁶ 2 Madd. 166.

⁷ 1 Jac. & W. 559.

limitations in question were contained in marriage articles.¹ Cases, therefore, arising under marriage articles are not strictly in point. Even the case of *Seale v. Seale*,² shows that the rule will be applied if the direction is merely to convey to A. and his heirs, or to A. and the heirs of his body.

The same principles of construction, indeed, apply to marriage articles as to articles of any kind and to executory trusts in wills. But, as the intention of a settlor by articles is obvious, this intention is always carried out, and the unborn issue get estates by purchase. Under wills, the courts have not the same clue to the testator's intention on this point. Therefore, no general rule of construction can exist for construing words of limitation in executory trusts under wills in the same manner as if the clause was in marriage articles.

If there be a direction to trustees to settle lands on A., or if the devise be to A. for life, and after his death to the heirs of his body, *Jarman*³ inclines to a strict settlement. The case of *Bastard v. Proby*, however, is no very conclusive authority on the effect of a declaration of this kind without any additional clause showing that the testator plainly intended that the first freeholder should only have an estate for life. *Jarman's* opinion, however, on the whole, is more likely to be followed, even in England, on any new case, than the ruling in *Blackburn v. Staples*.⁴ That case, indeed, appears to be rightly decided since the limitation to the unborn issue was to him when he attained 24, and was therefore void for remoteness, and could only be executed *cy pres* in the ancestor. Sir William Grant, however, did not rest

¹ See *Rochford v. Fitzmaurice*, 1 Con. & Laws, 158.

² Pre. Ch. 421, s. c. 1 P. Wms. 290.

³ Vol. II, 194.

⁴ 2 Ves. & Bea. 367.

his decision upon this point, but on the time-honored authority of the rule in Shelley's case. See *Blackburn v. Staples*, *ut supra*.

In *Platt v. Powles*,¹ the devise was to the testator's widow for life, and after her decease to the heirs of her body by the testator. On the death of the testator she became tenant in tail after possibility of issue extinct. *Jarman*² considers that for nine months after testator's death she could have acquired the fee by a recovery. But this opinion is surely unwarranted. The law regards possibilities only where there is no evidence to the contrary. A non-existing event, when examined after its proper date, is an impossibility. The widow's right, therefore, to acquire the fee appears to be contingent on her having issue in the sense that her fee would be more than defeasible on the event which happened, for it would then be proved to have been void from the beginning.

The rule in *Wild's case*³ operates sometimes as an exception to the rule in Shelley's case.⁴ The rule in *Wild's case* is acted on in America. That rule provides that, in case of a devise to A. and his children, A. will take an estate tail if he has no children when the will comes into operation. But if he has, the children will take concurrently with the parent.⁵ If the period of vesting is deferred, all children born before that date will take jointly with their parent.⁶ An estate tail in personalty, it is to be remembered, means the whole estate. The rule in *Wild's case* applies to both realty and personalty.⁷

¹ 2 Mau. & Sel. 1, § 65.

² Vol. II, 186.

³ 6 Co. 17.

⁴ 6 Rep. 17.

⁵ *Mason v. Clarke*, 17 B. 130.

⁶ *Cunningham v. Murray*, 1 De G. & Sm. 366; see *Read v. Snell*, 1 Coll. 86.

⁷ See *Audsley v. Horn*, 1 De G. F. & J. 226.

The rule in Shelley's case was received here as part of the common law. It still prevails in North¹ and South Carolina,² Tennessee,³ Virginia,⁴ Maryland,⁵ Pennsylvania⁶ and Ohio.⁷

The rule has been abrogated by statute in Connecticut, Massachusetts,⁸ New Jersey,⁹ New York and Michigan.¹⁰

In New York the Revised Statutes¹¹ constitute the heir a purchaser. Therefore, under a devise to A. for life, remainder to his heirs, alienation in fee is restrained during the life of A. and the minority (if any) of his heirs. These are the stock from which descent must be afterwards traced. A similar law prevails in New Hampshire.¹² In that State the rule in Shelley's case was in full force down to 1843.

The decisions in New York show, beyond any doubt, that the rule in Shelley's case has been abolished in that State.¹³ This, however, is a remedy just as bad as the disease.¹⁴ The natural function of the rule is that allowed it by the American courts of those States where legislation is silent on the matter. They suffer it to operate

¹ *Payne v. Sale*, 3 Battle, 455.

² *Carr v. Porter*, 1 McC. Ch. 60.

³ *Polk v. Faris*, 9 Yerg. 209.

⁴ *Roy v. Garnet*, 2 Wash. 9.

⁵ *Lyles v. Digge*, 6 Har. & J. 364.

⁶ *Findlay v. Riddle*, 3 Binn. 139; *Guthrie's Appeal*, 37 Penn. St. 9, 21.

⁷ *McFeely v. Moore*, 5 Ohio, 465.

⁸ *Steel v. Cook*, 1 Met. 282; Rev. Stat. c. 59, § 9.

⁹ New Jersey Rev. Law, 774.

¹⁰ Rev. Stat. Vol. I, 725, § 28.

¹¹ Vol. I, 725, § 28.

¹² *Dermett v. Dermett*, 40 N. H. 498.

¹³ *Freeborn v. Wagner*, 41 (N. Y.), 27; *Warfield v. Crane*, Id. 448; *Sheridan v. House*, Id. 569.

¹⁴ See *Brant v. Gelston*, 2 Johns. cas. 384; 1 Rev. Stat. 725.

where the context contains nothing to the contrary. It is likely that in those States the rule would not be applied where it is not the word heirs or heir that is used, but "son," "child," "family," "issue," or some other word of purchase. Issue, indeed, in England is considered to be, of its own nature, a word of limitation in wills. It certainly is less of purchase than the terms "son," "child," or "family," and therefore less efficiently resists the rule in Shelley's case.

The rule in Shelley's case is in force in Delaware. But, it is only regarded by the courts there as a rule of construction and intention. In Vermont there is a statutory system of conveyance. The rules of the common law, therefore, are by analogy to be considered as so far excluded in the construction of wills. In other words, the genius of construction should follow the statutory system of conveyance, and should only regard the use of technical phrases in wills as evidences of intent, and not possessing any cast-iron operation of their own. The reader is referred to a very able judgment by Judge Redfield, in 27 Vt. 475, and in *Smith v. Hastings*, 29 Vt. 240, where the learned author of the treatise on wills admirably suggests that the rule was founded on principles of feudal policy, which are obsolete and abrogated in America.

In Connecticut the rule was recognized to a certain extent until it was abrogated in 1821.¹ But, where there is no contest between ancestor and heir, the Connecticut courts incline to regard the devisee as taking in fee as against the heir of the testator.²

¹ 2 Redf. 339, 340.

² *Ingersoll v. Knowlton*, 15 Conn. 468. See *Cordey v. Adams*, 1 Harrington, 439; *Patterson v. Doe*, 7 Ind. 282; *Allen v. Hoyt*, 5 Met. 324; *Culbertson v. Daly*, 7 W. & S. 195; *Willis v. Rutchner*, 3 Wash. C. C. 369; *Stower v. Stower*, 9 S. & R. 434.

In Kentucky the clause "heirs of the body" is commonly a phrase of purchase.¹ In Pennsylvania the common interpretation is to regard the phrase as one of limitation.²

The rule in Shelley's case, however, prevails in Pennsylvania only to its natural extent. In other words, any clause to the contrary will neutralize it.³ As Chief Justice Lewis very well observed in *Gernet v. Lynn*,⁴ "Neither the policy nor the words of the rule apply" where the word used is children, and there are two in existence to whom the devise relates. The case of *Williams v. Leech*⁵ treats the word children as equivalent to "heirs." But that decision is completely outweighed by a host of authorities, which show that the rule in Shelley's case will be applied in Pennsylvania—and we may add in any other State—only where the context says nothing whatever to the contrary.

The cases of *Nagle's Appeal*⁶ and *McKee v. McKinley*,⁷ indeed, incline towards the adoption of the rule in Shelley's case, with all its feudal strictness as exemplified in the case of *Perrin v. Blake*.⁸ But the current of authorities is clearly in the opposite direction,⁹ whither, also, tends every legislative provision on the point. It is safe to assert that no American court would, at the present day, apply the rule in any case where the context militated to the contrary.

Under a devise to one for life and after his death to his children, the children, being alive when the will

¹ *Prescott v. Prescott*, 10 Belton, 56; *Jarvis v. Quigley*, 10 Id. 104.

² *Guthrie's Appeal*, 37 Penn. St. 9.

³ *Findlay v. Biddle*, 3 Binn. 139.

⁴ 7 Casey, 94.

⁵ 4 Casey, 89.

⁶ 9 Casey, 89.

⁷ 9 Casey, 92.

⁸ 4 Burr. 2579.

⁹ See *Chew's Appeal*, 37 Penn. St. 23.

took effect, were held to take as purchasers.¹ It follows, from this and various cases decided in Pennsylvania, that the rule in Shelley's case, like most of the common law rules of England, will prevail only where there is no expression whatever of a contrary intent in the will.²

In *Sisson v. Seabury*,³ a devise to A. and his male children, "lawfully begotten of his body, and their heirs forever, to be equally divided among them and their heirs forever," was held to pass a life estate to A., with a contingent remainder in fee to his children. He had none when the will was made.

The operation of the rule in Shelley's case is not excluded as often as is desirable, even in the United States. Thus, in *Monroe v. Douglass*,⁴ the devise was to three brothers, equally to be divided among them, provided that, "in case of the death of one or more of them, his or their share or their part should descend to the heirs of his or their body, and in case of the death of either without lawful children, then that said remainder should be equally divided." It was held that the brothers took estates tail.

In *Daly v. James*⁵ the rule in Shelley's case was as strictly acted upon as the judges who decided *Perrin v. Blake* could desire. In *Daly v. James* the testator devised all his real property to his son, and the heirs of his son lawfully begotten, and in case of the death of his son without such heirs, he directed that his real estate should be sold and the proceeds divided among the brothers and sisters of the testator and their heirs, or such of them as should be living at the time of his

¹ *Gernet v. Lynn*, 31 Penn. St. 94.

² See *Schoonmaker v. Stockton*, 37 Penn. St. 461; also, 2 Redfield on Wills, 338.

³ 1st Circ. (R. I.) 1832, 1 Sumn. 235.

⁴ 5 N. Y. (1 Seld.) 447.

⁵ 8 Wheat. 495.

death. The brothers and sisters all died leaving issue. Afterwards the son died without issue. It was held that, the Court being divided upon the construction of the devise, as an original question, it would follow the decision of the Supreme Court of the State¹ that the word "heirs" is to be construed a word of limitation, and, consequently, that the devise to the brothers and sisters failed to take effect, as they died in the lifetime of the son. This decision does not appear to be very satisfactory; at all events, at the present day it is of doubtful authority. There was no reason why the word "heirs" should be mentioned in order to pass the produce of the sale, which was personalty, to the sisters. The ruling, therefore, was equivalent to striking the word heirs out of the will, not for the purpose of effectuating, but of defeating the bequest to the heirs of such sisters as might die in the son's lifetime.

*Osborne v. Shrieve*² is another American decision where the rule in Shelley's case was applied without apparent cause. A. devised land to his son S. and to his male heir (in the singular), and to his heirs and assigns forever; but, if it should be that S. should depart this life leaving no male heir lawfully begotten of his body as aforesaid," then to the testator's grandson O. in fee. It was held that S. took an estate tail, with remainder over to O. on the indefinite failure of the issue of S. This was *Archer's case*,³ almost in so many words; nor was there room to contend that S. even took an estate tail in remainder after the remainder to his heir (by purchase), since the words "as aforesaid" precluded this construction. Yet, the heir of S., it was held, could not take by purchase, but that S. took an estate tail.

¹ 1 Binn, 546.

² 3 Mas. 391.

³ 1 Co. 66.

In *Smith v. Bell*,¹ the Supreme Court of the United States held that where personalty was given to testator's wife "absolutely," remainder after her decease to testator's son, the widow took only a life estate. The English courts would formerly have held the will void for uncertainty. At present they would doubtless act on the rule in *Smith v. Bell*. It is melancholy to find so many cases where a testator's directions in behalf of his issue have been, even as regards personalty, annulled by reasoning formed on analogies to the rule in Shelley's case. In many other cases the limitations have been, with equal imprudence, held to be repugnant to the context.

The operation of the rule has not, latterly, been sought to be extended even in England.² In *Herrick v. Franklin*, Giffard, N. C., denied the case of *Dark v. Fenner*³ to be law now. At the same time, there is no ground for hoping that, in the absence of legislative interposition, courts in the United Kingdom will adopt the American principles of construing the rule.

¹ 6 Pet. 68.

² See *Herrick v. Franklin*, Law Rep. 6 Eq. 593; *Halloway v. Halloway*, Id. 523.

³ 2 Russ & My. 557; see *Dott v. Cunnington*, 1 Bay, 453; *qu. contra* *Swain v. Roscoe*, 3 Ired. 200.

CHAPTER VII.

ESTATES TAIL.

§ 1. *Their nature and incidents.*

The greatest defect in the law of England and of some of the United States, is the existence of estates tail. These interests, as a rule, are not devisable unless they have been previously disentailed; nor are they subject to any charge or conveyance that does not operate so far as a disentailing assurance.

An estate tail differs from an estate in fee in descending, only to the particular heirs indicated. Thus, a devise to A., and the heirs female of his body, escheats if there be no such heir. A female collateral heir, not a descendant of A., will not inherit as she would if the devise was to A. and his heirs. So a devise to A. and the heirs male of his body, begotten by his wife B., will not descend to a son of A. by C., a subsequent wife. *A fortiori*, the entail will not descend to a daughter or a distant relation of A. as an estate in fee simple would.

Besides this peculiarity of descent from the first donee in tail, estates tail are subject to other special incidents. Although subject to dower and curtesy, they are not alienable except by fine or recovery. A fine bars the issue. A fine and recovery, or a recovery alone, will bar both the issue and remainder-men. An ordinary conveyance of the land is voidable by the issue. But, a deed of grant of rent charge or of any interest against "common right" is absolutely void on the grantor's death. If, however, he disentail the land, this lets in his charges: *aliter* if the issue disentails

Conveyances, leases, charges and incumbrances by tenants in tail are distinguishable into three classes, viz.: 1, those which are absolutely valid and indefeasible by the issue in tail; 2, those which may be avoided by him; and, 3, those which are absolutely void on the death of the tenant in tail, and are incapable of confirmation by the issue. To the first class belong fines, recoveries, all charges secured thereby, and leases or debts confirmed by statute. The second class comprises all conveyances of the land except by fine or recovery. The third class consists of grants of incorporeal rights and judgments.¹

If a tenant in tail first execute a rent charge or confess a judgment, and then settle the property by a voidable deed, the charges will endure until the deed is avoided by the issue. But if the tenant in tail settle the land by merely creating a term to certain uses, it is doubtful whether the issue in tail, if he takes an estate under the term cannot set it up, and yet avoid the rent charge and judgment, while, if the settlement were in fee, he would be at once remitted, taking a legal estate, and thus the settlement itself would be annulled.²

In a deed an entail can only be created by the words "heirs of the body," "heirs of the blood," "heirs of the flesh," &c. Words of inheritance and of procreation are both necessary. The estate likewise of the donor must be one of inheritance, and not an estate *par autre vie* or a term of years. This latter rule applies also to the creation of estates tail by will. A tenant *par autre vie* cannot create a greater estate than he himself owns. Therefore, such estates admit only of *quasi* entails. These may be barred by deed surrender or arti-

¹ See Co. Litt. Titles "Confirmation," "Estates Tail."

² See 1 Dyer, 51, a, note.

cles, but not by will. But the rule that requires words of inheritance for the creation of an estate tail by deed only apply in a will so far that the language used must be capable of implying a limitation equivalent to an estate tail in a deed. Any gift by will, therefor, that will confine the descent to the issue of the donee, will constitute an estate tail special or general, male or female, according to the directions, and may also imply cross-remainders.¹ Words of procreation will often be supplied in a will. Thus a devise to A. and his heirs male for ever, or to A. and his heirs males living to attain the age of twenty-one,² gives A. an estate in tail male.

A tenant in tail may commit unlimited waste of every kind, and cannot be restrained by condition from aliening by fine or recovery. As the estate is one of inheritance, it is liable to dower and curtesy, but not to debts after the death of the debtor, except so far as a local statute provides to the contrary.

A devise to A. and the heirs of his body, or to A. for life and after his death to the heirs of his body, vests an estate tail in A. So under a gift to A. and his issue or to A., and if he die without issue then over, A. takes an estate tail in realty, and the absolute interest in personalty in England and in those States where a restricted meaning of the word issue does not obtain.

The word "heirs," if used as synonymous with "issue," means "heirs of the body."³ Even in a deed a gift to heirs in the premises may be cut down in the habendum to "heirs of the body," although the habendum, as a rule, cannot abridge an estate given in the premises. The distinction is that the habendum may

¹ *Green v. Stevens*, 12 Ves. 419; *Doe d. Tremewan v. Permewan*, 3 Per. & D. 320.

² *Albec v. Carpenter*, 12 Cush. 382; *Appleton v. Rowley*, L. R. 8. Eq. 139.

³ *Albec v. Carpenter*, 12 Cush. 382.

explain the premises and "heirs of the body" are still "heirs."

Under a devise to A. and his heirs, and, if he die without issue, then to B., A. takes only an estate tail,¹ if there is no local statute on the point. So a devise to A. and his heirs, or heir or next heir,² or to A. simply, and, if he die without issue,³ remainder to B., gives A. an estate tail. But, if the devise be to the heir male of A.'s body with remainder to his heirs, the issue of A. takes an estate tail, according to the early cases.⁴ The superadded words varying the descent served to show that the heir and not A. was the stock of the entail. Mr. Hawkins,⁵ however, considers that words of limitation have now no more effect than words of distribution in excluding the rule. This opinion is probably right so far as the English cases are concerned. A devise to A. and his children, he having none at that time, gives A. an estate tail.⁶ A devise to B., if A. have no heirs, gives A. an estate tail if B. is a relative of A., for, otherwise, the limitation would be unmeaning. But if A. is a stranger, or a person who cannot be heir to B., the devise is void for remoteness.⁷ Under a devise to A., and if he die without heir or issue, the estate to go to B., his brother, gives an estate tail to A. by implication.⁸

Under a devise by testator to his wife for life, and after her decease to her two daughters, A. and B., to them, their heirs and assigns; but, in case they should die without issue, that the same should go to and vest

¹ *Hansell v. Hubbell*, 24 Penn. St. 244.

² *Cuffee v. Milk*, 10 Met. 366.

³ *Hawley v. Northampton*, 8 Mass. 3.

⁴ *Archer's Case*, 1 Co. 66.

⁵ P. 186.

⁶ *Nightingale v. Burrell*, 15 Pick. 104, 114.

⁷ *Griffiths v. Grieve*, 1 Jac. & W. 31.

⁸ 3d Circ. Pa. 1818; *Willis v. Bucher*, 3 Wash. C. Ct. 369.

in their two sisters, C. and D., it was held¹ that the devise to A. and B. was a fee tail and not a fee simple, the contingency upon which the limitation was to take effect not being limited to a life in being, but upon an indefinite failure of issue. It was also held that the estate given to C. and D. was a vested remainder, to take effect upon the death of both A. and B. without issue; that cross remainders in tail were to be implied between A. and B.; that at common law A. and B. would take a joint estate for life with several remainders in tail to their issue; but that, by the Statute of Rhode Island, it was turned into a tenancy in common, and that several estates tail vested in them.

In *Murdock v. Shackelford* the devise was as follows: "I lend to my son, W., the tract of land whereon I live during my life, and, if he has children at his death, he may dispose of it as he thinks proper, reserving to his now wife the use of the land for her life, as long as she remains his widow; but, if she marry, then she is to have only one-third part. If my son, W., dies without heirs of his body, then the land, with the consideration above-mentioned, to go to my son, Z.; &c. It was held that W. took an executory devise in tail after an estate for life to himself, with remainder in fee to his children living at the time of his death, which executory devise in tail was to take effect on the contingency of his dying without children living at the time of his death. W. appears to have taken a remainder in detail, and not an executory devise in tail after his life estate; since, if land be limited to two for their lives, with remainder to the heirs of him who dies first, the remainder, nevertheless, vests in the ancestor who dies

¹ *Lillibridge v. Adie*, 1 Mass. 224, 1 Circ. R. I. 1816.

² 4th Circ. Va. 1808, 1 Brock Marsh, 131; see *Wright v. Scott*, 4 Wash. Ct. Ct. 16.

first. W.'s estate is capable of being considered as a remainder. It therefore comes under the rule which forbids a contingent remainder to be ever construed as an executory devise.

§ 2. *No merger of estates tail.*

A remainder in fee is very common after a limitation in tail to the same person or to his sons. The estate tail does not merge in this remainder, unless it is changed by a fine into a base fee. It will then merge in the remainder when it descends, and the tenant will be in by descent and not by purchase. He will thus be liable for his ancestor's debts. Accordingly, wherever a tenant in tail can command the consent of the immediate feeholder, or has that feehold himself, he always suffers a recovery, which creates not a base fee, as a fine does, but a fee simple, incapable of merging in the remainder in fee, which it destroys. A remainder in fee may be created in a will as in a deed, after a limitation in tail. The estate tail in such a context will not be expanded into a fee, but left as an entail, with a remainder in fee. As a fee simple may, by implication, be cut down to a fee tail, so an entail general may, by the context, be cut down to mean an estate in tail special. Entails by implication are very frequent in wills, where there is a reference to a devisee's death without issue. The incidents of an estate tail are, of course, the same whether the estate is created by express words or arises by implication.

When a tenant tail has (which is usually the case), the reversion alone in fee by descent, he should never levy a fine. The effect of a fine is different from that of a recovery, inasmuch as it does not bar the remainder, but merely converts the entail into a base fee. This

estate in the case put would merge at once in the reversion in fee. The tenant in tail would then be tenant in fee by descent and not by purchase. He would, consequently, be liable for his ancestor's charges and debts, though if he had suffered a recovery its effect would be to expand the entail into a fee simple, and so shut out the reversionary fee by descent. He would thus be tenant in fee by purchase, and hold the land free and clear of all manner of incumbrances, except those created by himself.

A fine, however, is often alone available to a tenant in tail in remainder, if the particular tenant will not consent to the disentailing of the land. A fine is also convenient, as it can be levied at any time of the year, and not, like a recovery, merely in term. Besides, it is less expensive, and when levied with proclamations, gives a title by non-claim. It operates thus as a special statute of limitations in favor of tenants in tail. Yet, all these advantages are completely outweighed by the fact that if the tenant in tail owns the reversion in fee, he changes by a fine his estate from one by purchase to one by descent.¹

Redfield² lays down the doctrine that a remainder after an estate tail is void, as being too remote and founded on an indefinite failure of issue. No remainder, however, after an estate tail is void for remoteness, but, if limited after the indefinite failure of issue of one who takes no estate tail, then the limitation is void. If it is limited not immediately after the estate tail or in defeasance of it, but at a period, say a year or a month, after the termination of the estate tail, it is also void,

¹ See Burton's Compendium, title "Estates tail," Co. Litt. titles, "Estates tail," "Confirmation," "Charge," "Recovery." Shelford's Real Prop. Statutes.

² Vol. II, 216, § 3, 2d ed.

because, though executory, it is not limited so as necessarily to vest during a life or lives in being and twenty-one years afterwards.

The reason why a limitation by way of remainder after an estate tail, or as an executory interest defeating such an estate, cannot be too remote, is drawn from the fact that the tenant in tail can at any time bar such ulterior interest. If he die without barring it, then if it is a remainder, unless it vests at farthest upon the death of the tenant in tail, it is defeated and ceases to tie up the inheritance. If it is an executory interest, however, it may be void for remoteness, even though limited after an estate tail, although this position is denied by some writers of authority.

Executory interests, as they alone come within the reason of the rule against perpetuities, so are they unaffected by the incidents of remainders. These, as will be shown in a subsequent part of this work,¹ cannot be too remote, whether limited after estates in tail or for life. But, executory interests rest on a wholly different foundation. For instance, under a devise to A. in tail, remainder forty years afterwards to the heirs of B., here, if this executory interest to B.'s heir were valid, the inheritance might be in abeyance for forty years. It is clear such executory interest is void for remoteness. But if it were to abridge or defeat the estate tail, it could not be too remote.

The statement in Kent,² therefore, that a limitation after an estate tail is void by way of executory devise, as being too remote, is only true with the qualification mentioned. In other words, certain, but not all executory devises after estates tail are void. If the limitation

¹ See *infra*, ch. 26 on "Void testamentary gifts."

² 4 Comm. 276.

is a remainder, or even a shifting use, it is valid. But if it is a springing use, it is void.

§ 3. *American modifications of the law of entails.*

Estates tail were introduced into our law with the other elements of English jurisprudence.¹ But, being inconsistent with the more radical principles of a Republic, estates tail are now obsolete in some States, and are greatly modified in most others. Where they do exist in their primary force, they can only be barred by fine or recovery.

Although they still prevail in Massachusetts, Delaware, Pennsylvania and Maine, they may in all of these States be barred by ordinary deed and in some by will. In Massachusetts estates tail descend as in England,² and in some of the States where they still exist they may be barred by will and attached by creditors.³

Estates tail are abolished in Virginia, New Jersey, New York, North Carolina, Kentucky, Tennessee and Georgia. They are unknown to the laws of South Carolina and Louisiana. In New Hampshire a tenant in tail may convey by ordinary deed. In Alabama and Mississippi a conveyance may be made to a succession of donees, and to the heirs of the remainder-man. In Connecticut, Missouri, Ohio, Illinois, New Jersey and Vermont, the first donee in tail takes a life estate and a fee simple vests in his heirs or in the first remainder-man. A tenant in tail in these States has virtually only an estate for life, as he cannot encumber the inheritance.⁴

¹ 4th Kent, 5 ed. 14, 15.

² *Wight v. Thayer*, 1 Gray, 286.

³ *Danes Abr.* vol. 4, p. 621; *Purdon's, Dig.* 353.

⁴ See *Den v. Small*, 1 Spencer, 151; *Saunders v. Hyatt*, 1 Hawks, 247; *Tinsley v. Jones*, 13 Grat. 289; *Bramble v. Phillips*, 4 Leigh, 90; *Thom-*

In Indiana a tenant in tail is deemed to be seized in fee after the second generation.

In Connecticut there may be a tenancy in special tail.

In Rhode Island estates tail may be created by deed, but not by will longer than to children of the devisee, and they may be barred by deed or will.

In some other States almost all the common law distinctions between estates in fee simple and in tail are abolished, and both kinds of limitation are held to be virtually in fee simple.¹

In Maryland estates tail general are virtually abolished, being devisable and chargeable with debts. . But estates tail special in that State cannot be devised or charged with other than mortgage debts.²

In the other States where estates tail are abolished by statute, a limitation in fee tail is equivalent to one in fee simple.³

ason v. Andersons, 4 Leigh, 118; Ross v. Toms, 4 Dev. 376; Doe v. Craiger, 8 Leigh, 449. For Connecticut, see Hamilton v. Hemstead, 3 Day, 332; Allyn v. Mather, 9 Conn. 114. For Vermont, see Giddings v. Smith, 15 Vermont, 344.

¹ See Johnson v. Johnson, 2 Met. (Ky.) 331.

² See Newton v. Griffith, 1 Harris & Gill, 111.

³ Bramble v. Billups, 4 Leigh, 90.

CHAPTER VIII.

DYING WITHOUT ISSUE.

Whatever liberality of construction is allowed in the case of a deed, the same and much more is conceded in the case of a will. Now, even in a deed the *habendum* is allowed to explain the premises, and thus indirectly often to abridge the quantity of interest passed by the premises. For instance, a grant to A. and his heirs, *habendum* to him and the heirs of his body, will give A. only an estate tail, although he takes a fee by the premises. But, if the grant were to A. and his heirs, *habendum* to him for life, the *habendum* would be void. For, of two totally repugnant clauses in a deed, the first will prevail. The reverse rule is adopted in the case of wills. It is rarely, however, that even a will contains two passages that are strictly contradictory of one another, though wills doubtless often enough abound in sentences that are more or less incongruous.

By analogy to the limitation to A. and his heirs, and if he die without heirs of his body, over, a devise to A. and his heirs, and if he die without issue over, gives A. an estate tail. For "issue" in a will is equivalent to "heirs of the body" in a deed; and, as this clause may cut down a fee in instruments of the latter class, *a fortiori*, it may have the same effect in wills.

In the case put there is no difficulty. But let us suppose that the devise is to A., and if B. dies without issue, remainder to C. in fee. Here the operation of the phrase "dying without issue," would have the effect of rendering the devise to C. void for remoteness. In other words, the phrase "dying without issue" means

dying and leaving no issue at some time or other, and not merely at the time of death of the *propositus*. As such an indefinite failure of issue might not happen within a life or lives in being, and twenty-one years after, the remainder to C. is void for remoteness. But, if the limitation were to A. and his heirs, and if he die without issue, remainder to C., this remainder would be good, inasmuch as it would be limited to take effect on the determination of an estate tail, and no remainder after an estate tail can be too remote, because the tenant in tail can always bar such ulterior interest.¹

This meaning of the phrase in question is much more easily got rid of in bequests of personalty, than where the devise relates to freehold. The phrase "*leaving no issue*," accordingly, has been decided to point to a failure of issue at the death of the *propositus*, in case the subject of the disposition be personalty; but, if the subject-matter is freehold, the phrase is construed to mean an indefinite failure, even though in the very same will it be construed, as already stated, so far as it is used in disposing of personalty. This actually happened in the case of *Forth v. Chapman*.² The phrase "*leaving no issue*" was construed in that case to denote an indefinite failure as regarded realty, and a failure at the time of death of the *propositus*, as regarded personalty. The very same point was decided in *Mayzcker v. Vanderhorst*.³ In that case the devise was of real and personal estate to the testator's daughter and "*the heirs of her body forever*," but, if she should "*depart this life leaving no lawful heir or heirs of her body*" then over. It was held that the limitation over pointed to an indef-

¹ See *Hallet v. Pope*, 3 Harr. 542; *Moore v. Howe*, 4 Mon.; *Downing v. Wherrin*, 19 N. H. 9.

² 1 P. Wms. 653.

³ 1 Bailey's Eq. 48.

inite failure of her issue as regarded the realty, but to a failure at the time of her death as regarded the personalty.

As the general rule of construction is not carried out where the bequest is personalty, provided the context at all favors a departure from it, so also the courts have engrafted another exception upon it, *viz.*, where the testator has no issue and uses the phrase "dying without issue" in reference to himself. This will then mean a failure of issue at his death, no matter whether the subject of the donation is real or personal.¹

A third class of exceptions to the general construction of the phrase "dying without issue" consists of those cases where the context of the will shows that the testator meant a failure at the time of death. This, indeed, is not so much an exception to the rule of construction referred to as a statement of the fact that a testator is bound by no rule of conveyancing not amounting to a rule of public policy. The reader of a treatise on wills, therefore, should remember that every rule and exception thereto which he is reading applies only if the testator has said nothing to the contrary. If he has, the will of the testator, and not the rule of law, will be followed. We refer, therefore, to the fact that the testator may preclude the statutory or common-law meaning of the phrase "dying without issue" merely that we may add that a failure of issue, at the time of death of the *propositus*, will always be more readily inferred if the subject of the gift be personalty than if it be freehold.²

Where the gift over is to take effect expressly on the death of the first taker, there is no difficulty,³ no matter

¹ French v. Caddell, 3 B. P. C. (Toml. ed.) 257.

² Fearne on Cont. Rem. 471.

³ Doe d. King v. Frost, 3. B. and Ald. 546.

whether the *propositus* takes an express or an implied fee.¹ But, if he takes only an estate for life or an estate tail, the restricted construction will not be adopted.² The reason is because the issue of the *propositus* will be sought to be benefitted in the cases last put by giving the first taker an estate tail. This reference or presumption in favor of an estate tail, however, will be rebutted if the *propositus* gets by the will certain limited powers which he would not require if he was to be plenary tenant in tail.³

If the event of dying is confined within a certain age of the *propositus*, the failure of issue cannot be held to be indefinite. In such a case, as, for instance, under a devise to A. and his heirs, and if he die under twenty-one and without issue remainder to B., this remainder will take effect if A. has no issue living at the time of his death. A. does not take an estate tail, but a fee, subject to an executory devise in favor of B.⁴ An estate tail in possession is thus always better than an estate in fee, if this is subject to an executory devise; because the tenant in tail can bar all remainders and executory devises after, or in defeasance of, his estate tail, whereas a tenant in fee cannot defeat any valid, ulterior limitation whatever.

As an estate tail always prevents a limitation after it from being too remote, because the tenant in tail can bar it, it was on this account that the courts interpreted a failure of issue to mean an indefinite failure as regarded land; because the remainder over was thus supported and prevented from being too remote, while, even if the tenant in tail defeated it, he then had a fee

¹ *Blinston v. Warburton*, 2 K. & J. 400.

² *Ib. Ex parte Davies*, 2 Sim. N. S. 114.

³ *Doe v. Frost*, 3 B. & Ald. 546.

⁴ *Eastman v. Baker*, 1 Taunt. 174.

which would go to all his issue, as well as to his heirs general. In cases of personalty, however, there is no such thing as an estate tail. The person to whom an entail is limited in personalty takes the absolute interest,¹ and a remainder over is void. Hence the courts strained after confining the meaning of the phrase "dying without issue," and especially to denote a failure of issue at the death of the *propositus*, in case the subject of the donation was personalty.

The nature of the subject-matter, and the terms of the ulterior devise, sometimes show that a failure of issue at the time of the death of the *propositus* is what is intended. Thus, if the land is chargeable with moneys to be paid within a definite period after the decease of the first taker;² or, if the ulterior estate is for life only,³ the restricted construction will obtain.

Jarman⁴ thinks that, as an estate for life is often, in practice, limited after an estate tail, the fact that the ulterior interest is for life ought not to lead to an adoption of a restricted construction of the phrase "dying without issue." But this reasoning is hardly philosophical or practical; for, in the case of the limitation in question, the testator means that the first taker is to have only a life interest, unless he has issue. Life interests are often limited after estates tail, but not where the tenant in tail has actually in existence a large family at the time. Such a limitation over would be frivolous. Jarman then compares his merely abstract position with an actual limitation to a living person, after a gift for life to a person who, most probably, has no issue at all at the time of making the devise. Sir

¹ *Appleton v. Romley*, Law Rep. 8 Eq. 139.

² *Nichols v. Hooper*, 1 P. Wms. 98.

³ *Roe d. Sheers v. Jefferey*, 7 Durn. & East. 589.

⁴ Vol. II, 435.

W. Grant, however, would not adopt the restricted construction in a case where some only of the remainders over were for life.¹

Where the property, in the devise over, was charged with certain sums of money to be disposed of by the will of the first devisee, the restricted construction will obtain.²

Jarman³ very justly observes that, if the first taker gets only an express estate for life, the restricted construction ought not to be so readily applied as where he gets the fee, because in the latter case the issue may take by descent, whereas in the former they get nothing, and yet the remainder-man takes nothing until they fail. Besides, when the first taker has a fee limited to him, the ulterior tenant cannot be barred by a recovery, while the prior tenant has a fee which may become obsolete.

The phrase "dying without issue," in a devise of freehold land, is construed generally in the United States as it was in England⁴ prior to 1838.⁵ Consequently, in those States where there is no statutory provision on the point, the phrase is equivalent to dying without heirs of the body. In several of the States, however, as in England since the date mentioned, the failure of issue refers to the death of the ancestor. Even in those States where there is no statutory rule of construction on this head, the courts strain at some plea in the context for interpreting the phrase in its restricted sense, if this is necessary to support a limitation over. Thus, it has been held,

¹ Barlow v. Salter, 17 Ves. 479.

² Nichols v. Hooper, *ut supra*.

³ Vol. II, p. 440.

⁴ 1 Vict. c. 26, § 29.

⁵ 3d Circ. Pa. 1818, Willis v. Bucher, 3 Wash. C. Ct. 369.

that a devise, "if either of my sons A. and B. should happen to die without any lawful heirs of their own; then the share of him who may first decease shall accrue to the other survivor and his heirs," points to a failure of issue at the death of A. or B. A. and B. were held each to take a conditional fee, subject to an executory devise in favor of the survivor.¹

If the subsequent estates are for life only, this is some intimation that the testator did not contemplate an indefinite failure of issue.² Jarman, however, thinks the decision cited an "extraordinary one."³

The phrase, "leaving no issue," will be construed more readily than "dying without issue," in a restricted sense. Yet, "leaving no issue" will not be restricted in meaning as to realty in England, even though the lands be copyhold, in which there is no custom of entailing, and of which the ulterior limitation is, therefore, too remote. But, if the testator has no issue, and refers to himself leaving no issue, the failure referred to will be admitted to point to the time of his decease.⁴ So a devise to A. and his heirs, but if he die under twenty-one and without issue, then over gives A. a fee determinable on his death without issue. A like construction prevails in every case where the dying without issue is connected with some event personal to an individual.⁵

A gift over if the devisee dies under twenty-one, or under twenty-one and without issue, gives him the fee by implication if he attains age, even in those States

¹ 3 *Abbott v. Essex Company*, 2 Curt. C. C. 126; see *Smith's Appeal*, 23 Penn. St. 9.

² *Roe d. Sheers v. Jeffery*, 7 Durnf. & E. 589.

³ 2 Jarm. 435.

⁴ *French v. Caddell*, 3 B. P. C. Toml. ed. 257.

⁵ *Griswold v. Greer*, 18 Geo. 545; *Armstrong v. Armstrong*, 14 B. Mon. (Ky.) 333.

where a general devise does not mean a fee.¹ In these States, also, the devisee takes the fee if the legal estate is in trustees, and the purposes of the trust require that they should take the legal fee.

In *Doe v. Watson*² there was a devise to two grandchildren of the testator, provided that if both should die under age and without lawful issue, then over. It was held that, as the children attained age, the devise over never took effect.

Where a testator does not contemplate the event of any of his children dying under age, but directs the distribution of his estate to be made when the youngest child attains majority, the bequest may be deemed dependant on the majority of that child alone, and is not void as suspending the power of alienation for more than two lives.³

A devise of a reversion expectant on an estate tail should provide that the clause, dying without issue, should mean the issue inheritable under the entail, or else refer to that estate, otherwise the gift may be void for remoteness. The phrase, "dying without issue," by the 1st Vic. c. 26, s. 29, points to issue at the decease of the ancestor. The phrase in question, therefore, cannot in future in England, or in States having analogous statutes, give an estate tail by implication, except in the instances excepted in the section. This section will not abridge estates given previously to children, because the word issue will refer to the children, and, if occurring subsequently, will mean such issue according to the rule in *Malcolm v. Taylor*,⁴ while in other cases it will prevent the limitation over from being void for remoteness.

¹ *Burke v. Annis*, 11 Hare, 232.

² 8 How. 263.

³ *Burke v. Valentine*, 52 Barb. 412; s. c. 5 Abb. Pr. N. S. 164.

⁴ 2 Russ. & Myl. 416.

A limitation over after a general failure of issue is void as to personalty. Hence, the courts endeavour still more earnestly than in the case of realty to confine the reference to a failure of issue, to the time of the death of the first taker of personalty.

As regards such property, therefore, words denoting a failure of issue, following a bequest to children,¹ either for life in fee or in tail, refer to them and will not enlarge any of the prior estates. This construction will *a fortiori* apply where the previous bequest is to children, even though they be subjected to certain qualifications. Where the phrase is "in default of such issue," it obviously points to the preceding donees, whether children, sons, or daughters. This rule applies to devises as well as bequests, and even though the previous bequest be to child or daughter in the singular. The parent in such cases takes no estate tail.

Where there is a devise to issue of a particular kind, or subjected to certain restrictions, the clause, in default of issue (not "such issue"), will usually be held not to refer to the preceding issue, but to enlarge the ancestors' estate by implication to an estate tail in remainder.¹ Therefore, under a devise to A., remainder to his eldest son, or to a limited number of his sons, or to one son, only in tail male, or for life, and in case A. dies without issue, over, A. takes an implied estate tail in remainder.² Jarman very justly considers that the phrase, in default of issue, ought always have been construed to be referential only,³ and as equivalent to the phrase, "in default of such issue."

Even as to personalty, the clause, "dying without issue," will receive only the restricted signification when followed by the words "after his decease," (but not

¹ 2 Jarm. 362.

² Stanley v. Lennard, 1 Eden, 87.

³ 2 Jarm. 362.

"after him,)" or, "if he marry without consent, or die without issue." This latter phrase shows that the testator did not mean to give the devisee an entail at all hazards, but only a fee determinable.¹ This seems to be the true principle of the decision in *Keiley v. Fowler*.² The ulterior legatee in all cases of this sort must be intended not merely to survive the propositus, but all his issue. The context, by reference to a definite period when the issue are to fail, or, by containing powers having only a limited scope, may cut down the phrase, "dying without issue" to failure at the time of the death of the propositus.³

As the American courts incline to ignoring the rule in *Shelley's* case, so they also lean to construing the words "dying without issue," when unexplained by the context, as denoting a failure of issue at the death of the ancestor. With respect to this rule, the English cases prior to 1838 are more in harmony with those of the United States than where the question relates to the rule in *Shelley's* case. The English courts always inclined, almost as much as our own, to give the phrase, "dying without issue," a restricted meaning. Old English cases on this question, therefore, are valuable to the American practitioner.

The doctrine of *Forth v. Chapman*⁴ has not been absolutely adopted by the American courts, but their disposition is strong to cut down the meaning of the phrase, "dying without leaving issue," or, "dying without issue," to death, or failure at the death of the propositus, even as regards realty. Thus, in *Den v. Schenck*,⁵

¹ *Trotter v. Oswald*, 1 Cox, 317.

² 3 B. P. C. Toml. ed. 299.

³ See further *Dallam v. Dallam*, 7 Har. & J. 220; *Carter v. Tyler*, 1 Call, 143; *Moody v. Walker*, 3 Ark. 198.

⁴ 1 P. Wms. 663.

⁵ 3 Halst. 29.

the phrase, "die without issue alive," was held to impart only the restricted meaning. In *Anderson v. Jackson*¹ the phrase, "the share of the devisee dying without lawful issue, was to go to the survivor," received a similar construction.

But if there is no expression, however slight,² the rule of the common law will be applied, and the failure of issue will refer to all descendants,³ except in those States where a statutory provision exists to the contrary. The American statutes on this point are more satisfactory than the analogous English provision (1 Vict. c. 26, § 29), which relates only to the use of the word "issue," and not "heirs or children."

The rule of construction? adopted by the 29th section of 1 Vict. c. 26, had been previously enacted in Virginia in 1819, in Mississippi in 1824, in North Carolina in 1827, and in New York by the Revised Statutes.⁴ The old rule, however, may apply if the clause refers to a preceding limitation, and it must apply if the context is plain to that effect. In such cases the clause will either raise an implied estate tail in the propositus, or else will render the ulterior limitation void for remoteness. The statutes referred to only operate where the testator's meaning of the words used by him is not clear or defined by the context.

It has been doubted whether, in case of a devise to A. and his heirs, and, if he die without issue over, A. would not still take an estate tail in England and those States which have analogous statutory provisions on this point. It is probable the English Wills Act will be held not to apply to this case. The issue referred to

¹ 16 Johns. 382.

² *Ladd v. Harvey*, 1 Fost. 514.

³ See *Edelen v. Middleton*, 9 Gill, 161, where the cases are examined.

⁴ See 4th Kent, 5th ed. 279.

are comprised in the previous word "heirs." The context thus shows that the testator contemplates a general failure of issue, and not a failure of them at his death. The statutory interpretation of the meaning of the phrase, therefore, seems precluded by the previous devise in fee. But more difficult questions will arise on this head under the American statutes, which (unlike the English act), expressly provides for a death without "heirs" as well as for death without "issue."

In Virginia,¹ Mississippi,² North Carolina,³ dying without issue, heirs, heirs of the body, or children, will mean, whether in a deed or will, a failure of issue at the death of the ancestor or propositus. By the New York Revised Statutes, a remainder, limited after an entail, operates as a contingent limitation on a fee, and vests in possession on the death of the first taker without issue living at his death.⁴

As to the question whether a limitation of personalty to the survivor of several persons, in default of issue of either, involves a restricted construction of the phrase we are considering. See *Cutter v. Doughty*.⁵

If the phrase "importing a failure of issue" is preceded by a power implying a gift in default of appointment to the issue of the donee, living at his decease, the restricted construction will of course prevail in any State.⁶

The rule of construction established by the 29th section of 1 Vic., c. 26, and the analogous American statutes, does not apply if the context implies to the contrary. It will, however, be often still a question of

¹ Stat. 1819.

² Stat. 1824.

³ Stat. 1827.

⁴ See *Hone v. Van Schaick*, 3 Barb. Ch. 489.

⁵ 23 Wend. 513; *Zollicoffer v. Zollicoffer*, 4 Dev. & Bat. 438.

⁶ *Target v. Gaunt*. 1 P. W. 432.

difficulty to determine whether the statutory rule is neutralized by the context or not. The old cases thus continue to have much, though, of course, not the whole of their pristine value, even in those States where the restricted construction obtains by statute.

For further elucidation of the phrases "dying without issue," or "without lawful issue," see *Patterson v. Ellis*.¹

Under the statutory meaning of the word "issue," the remainder man over takes an executory interest which cannot be barred. Under the ordinary meaning of the phrase "dying without issue," the remainder man over takes a remainder, which is at the mercy of the preceding tenant in tail. The enactments on this head are, on the whole, to be condemned, except where they restrict the new meaning of the word "issue" to wills where the propositus takes no estate. For, in those instances where he takes expressly for life, the intention of the limitation over on his dying without issue is certainly to benefit the issue, either as heirs or purchasers. But the act defeats their claims under either head.

¹ 11 Wend. 259; *Norris v. Byea*, 13 N. Y. (3 Kern.) 273; *Dumond v. Stringham*, 26 Barb. 104; *Wilson v. Wilson*, 32 Barb. 328; *Du Bois v. Ray*, 7 Bosw. 244; 11 Wend. 259; 5 Mass. 500.

CHAPTER IX.

JOINT TENANCY.

The law favors the amalgamation of different estates in one person. Hence, perhaps, arose the rule in Shelley's case, and the doctrine of merger. The law also favors the concentration of the estates of different persons in one of them, if the construction will so permit. Hence, *semble*, flowed the motive for its presuming a *jus accrescendi*, under a limitation to several. This doctrine, indeed, is found in Roman law; but under the feudal system the civil law did not prevail of its own authority, but only by its intrinsic merits, and its convenience for feudal purposes.

A devise, like a conveyance, to two or more persons, not being husband and wife, constitutes them joint tenants. The law presumes a joint tenancy in such cases, and equity follows the law. The peculiar incident of a joint tenancy is that, though any of the partners can assign or can devise his share without the consent of the others, these, nevertheless, have what is termed the *jus accrescendi*, or right of survivorship or accruer as to unassigned shares.

This is very convenient in trust estates, as it is not then necessary to seek out the heirs of deceased trustees, in order to convey. The common law of joint tenancy, however, is much infringed upon by statute, both in the United States and in England.¹

At common law there were some nice distinctions

¹ See Kent, 5th ed. 361, 362; *Frewen v. Rolfe*, 3 Br. C. C. 224; *Varnum v. Abbott*, 12 Mass. 474.

between the forms of conveyance open respectively to joint tenants, tenants in common, and parceners. Joint tenants could both enfeoff and release, while tenants in common could only enfeoff, and parceners release. This privilege of joint tenants was important, when we consider the efforts made in early times to devise a system of secret conveyancing by means of releases founded upon nominal leases. As a joint tenant was by statute authorized to dismember the joint tenancy, he could also thus constitute himself a tenant in common any time by deed, though not by will.

The incidents of a joint tenancy at common law are unity of possession or seisin, of interest, title, and time of vesting. Under wills or conveyances by way of use or trust, the last incident is not indispensable. Devisees may take joint interests, and yet come into being or otherwise attain vested interests at different periods of time. For instance, under a gift to A., remainder to the children of B., all B.'s children at the death of A. are joint tenants, although their interests vested at different times.¹

Under a limitation of this kind to a class, some members of which are already born, the natural construction would appear to be to hold the existing members to take as joint tenants, but subject to a divesting of their interests proportionately on the birth of fresh members of the class. The divesting operation cannot affect the quality of the interest taken by the existing devisees more than it can the vested nature of the interest. However, in *Woodgate v. Unwin*² all were held to take in common, while in *Stratton v. Best*³

¹ *Kenworthy v. Ward*, 11 Hare, 196.

² 4 Sim. 129.

³ 2 B. C. C. 233.

all were held to take jointly. The only mode of reconciling these cases is to consider that limitations of realty will be construed more readily than gifts of personalty to be in conformity with the common law presumption in favor of a joint tenancy. The former case was under a will; the latter under a deed to uses. But wills and uses are, as already stated, considered to be on the same footing with respect to common law presumptions. Indeed, neither of the cases referred to can be considered as of much authority. The doctrine in *Kenworthy v. Ward*¹ may, therefore, be considered as the correct statement of the law on this point.

Whether the devise be to several by name, or to a class, they take as joint tenants, and whether they be children, issue, or next of kin, unless there is a reference to the statute of distributions,² or some of the shares are contingent, as when the limitation is to such members of the class as will attain twenty-one.³ The case of *Woodgate v. Unwin*, however, is of no real authority on the point, inasmuch as the principle of the decision, as expressed by the court, was that no interests that vested at different times could be held in joint tenancy, a doctrine long exploded as regards wills and conveyances by way of use.

The exceptions to the rule presuming a joint tenancy in case of a limitation to several are, first, where the gift is to two, being husband and wife. Such a grant or devise constitutes a peculiar tenancy. The donees take by entireties, and differ from joint tenants, inasmuch as neither alone can defeat the interest of the other surviving. Another exception exists in the case of partner-

¹ 11 Hare, 196.

² *Bullock v. Downes*, 9 H. L. C. 1.

³ *Woodgate v. Unwin*, 4 Sim. 129.

ship property. A third exception to the rule is, that if a devise or grant be made to two persons who cannot lawfully intermarry, or to two men or two women,¹ and the heirs of their bodies, the donees are joint tenants only for life, with several inheritances in tail. For, it is not possible that they can have a common lawful heir of their bodies. The right of accruer in such a case attaches only to the life interest. The presumption of a joint tenancy is also often varied in equity under contracts where the parties contribute unequally. The slightest indication, too, in a will that the donees are to take in common will be enforced in equity. For the court is ever ready to overrule the common law *jus accrescendi*, on the ground that equality or a tenancy in common is more equitable than a chance game of survivorships. However, if there be nothing in the context to enable the court to carry out its favorite views, it must adopt the legal presumption.

The presumption of a joint tenancy applies to a bequest by way of trust or otherwise, and whether the gift be of a sum of money or of a residue. But, it is possible that a tenancy in common would be more readily inferred in a doubtful case where the bequest was personal than if it be real, just as in conveyances, by way of use or under a will, a tenancy in common may be created by words that would fail to sever the jointure in a deed. As the presumption of a joint tenancy is a common law rule, the further we pass from common law into the region of equity, and still further into that of the civil law and of the ecclesiastical courts, the common law presumption grows weaker. Indeed, equity so favors a tenancy in common that it grasps at any straw in the context to promote such a construction.

¹ Doe *d.* Littlewood *v.* Green, 1 Mee. & W. 229.

But, if there be nothing of this nature in the context, the Court of Chancery is powerless to ignore the rule of law that presumes a joint tenancy in a gift to two or more, so far as such presumption is practicable.

The presumption of a joint tenancy applies to gifts, to classes and to children. But, if some are unborn, then, as to these, the gift, if it arises under a common law deed, is necessarily in common. For common law estates that vest at different times cannot be in joint tenancy. Yet, as regards the devisees, and especially the members living at the time of testator's death, these, *semble*, take jointly. The case of *Woodgate v. Unwin*¹ differs on this point from *Stratton v. Best*.² But this, as already stated, was a conveyance by way of use, and uses and wills are considered as capable of conferring a joint tenancy, even though the shares vest at different times.

As the court, when enforcing any equity, will carry out its own peculiar rules, so, when executing trusts executory, whether contained in wills or deeds, it will constitute any classes of donees tenants in common.³

The exceptions, then, to the common law presumption (which is followed by equity), in favor of a joint tenancy in a gift to a class, are: 1, where the donees are husband and wife; 2, as to inheritances, but not life interests, where the donees cannot by possibility have a joint heir; 3, cases of partnership; 4, executory trusts. The dictum of Lord Hardwicke in *Bagshaw v. Spencer*,⁴ to the effect that trusts executory do not differ from trusts executed, has been long since overruled.

Executory trusts are directions contained in wills, marriage articles and contracts, to convey or settle

¹ 4 Sim. 129.

² 2 B. C. C. 233.

³ *Marryatt v. Townly*, 1 Ves. Sen. 102.

⁴ 1 Ves. Sen. 142.

property in a certain manner. Such directions are construed differently from clauses in final instruments, the trusts of which are said to be executed or completed. Most wills contain very few executory trusts, as distinguished from executory interests, or future uses or trusts. The testator generally settles the property himself; but if, instead of doing this, he directs a devisee in trust, or the donee of a power to convey land to A. in strict settlement, or to the children of A., equity will, in the former case, direct the conveyance to be to A. only for life, with remainder to his first and other sons in tail, and in the latter case to the children as tenants in common. But, if the devise was a trust executed to A. and the heirs of his body, A. would take an estate tail, while under the devise to the children they would take as joint tenants.

The preceding observations respecting devises and trusts executed apply only where the context discloses no intention on the part of the testator to create a tenancy in common. Any limitation to this effect, of course, will be as legal in a will as in a deed, while many expressions in a will or conveyance by way of use that will create a tenancy in common will not have this effect in a common law deed. Any phrase in a will that imports division by equal or unequal shares¹ will create a tenancy in common.

A tenancy in common has been held to be created by the phrases, "equally to be divided," "equally amongst them," "severally," "equally," "respectively," "part alike," "in moieties," &c.²

Where an ulterior donee, however, is not to take his interest until after the death of a survivor or of

¹ 2 Jarm. 162.

² See *in re* Tiverton Market Act, 20 B. 374.

previous donees, this imports that these take as joint tenants¹ and that the *jus accrescendi*, or accruer, applies to accrued as well as to original shares.²

If the gift is in joint tenancy, and any of the limitations are void, lapse, or are revoked, the remaining donees take the whole. But, if it be a tenancy in common, the heirs will take unless the gift is to a class,³ in which case all the members of the class living at the death of the testator will take.

In *Brownell v. De Wolf*,⁴ a person devised to "all his surviving children in equal divisions" all his real estate, and afterwards, by a codicil, revoked the share of a daughter without limiting any devise over. It was held that, as the devise to the children was in common, the revocation of the daughter's share did not enlarge the estate of the others, but produced an intestacy as to that share.

As to what constitutes a severance of a jointure, see *Gould v. Kemp*.⁵ Even in England the presumption of a joint tenancy is a very slight one, and is daily becoming more evanescent.⁶ In the United States it is nowhere regarded as more cogent than the presumption in favor of the rule in *Shelley's case*, which, as stated in Chapter VI, may be defeated by any expression, however trivial, to the contrary.⁷

¹ *Doe d. Calkin v. Tompkinson*, 2 Mau. & Sel. 165.

² 2 Jarm. 166, note; see chapter 16, *infra*, on Survivorship.

³ *Sackett v. Mallory*, 1 Met. 356.

⁴ 3 Mass. 486; see *Pryor v. Dunkle*, 2 Wash. C. Ct. 416, for a plain case of partial intestacy.

⁵ 2 My. & K. 304.

⁶ See *in re Morse*, 31 L. J. Ch. 363.

⁷ See 4th Kent Comm. 5th ed. 361, 362; 2 Hilliard's Abr. Law of Real Estate, c. 4, pp. 42-4; *Sackett v. Mallory*, 1 Met. 355.

CHAPTER X.

FUTURE ESTATES.

§ 1. *Remainder.*

At common law the feehold could not be first limited on a contingency, but an executory devise may be thus created. A common law remainder should wait until the preceding estate or estates determined, but an executory devise may abridge them. In short, an executory devise is bound by no doctrine of conveying, except the rule against perpetuities, and it cannot, like a remainder, be defeated by any incident of the estate of the particular tenant.¹

The framers of the Revised Statutes of New York² have imbued remainders with all the qualities of executory devises, and have also abolished uses, thus copying in the letter the ancient doctrine of the common law judges that there could be no use of a use.

A remainder is either vested or contingent. A contingent remainder fails altogether, if it does not become vested before the period specified in the will. For instance, under a devise to A. for life, remainder to the heir of B., if B. survives A., the heir of B. never takes anything. Contingent remainders are divided by Fearne into four classes. The following remainder is contingent on the four conditions described by that writer. To A. till B. returns from Rome, and from and after the return of B. and C. from Rome, and the death of D., remainder to the heir of E., when he shall attain age. Unless all these contingencies are fulfilled before

¹ See *Allen v. White*, 16 Ala. 181.

² Vol. I, 728, § 45.

B. returns from Rome, the heir of E. never takes the estate. Executory devises are subject to no legal period like remainders before or at which at latest they must vest. They are, therefore, more advantageous than remainders to devisees. They can only arise under wills or deeds by way of use, and will not be construed as executory even in those instruments if the limitations can by possibility at the time of the testator's decease be deemed remainders.¹ For a common law estate is always presumed, instead of a statutory one. The law of remainders is thus more extensive under wills than would be suspected on first consideration.

Contingent remainders may be preserved from destruction by the particular tenant, by means of a limitation to trustees to preserve the contingent estates. Even where contingent limitations are protected by statute against the merger, surrender, or forfeiture of the estate of the particular tenant, a limitation to trustees to preserve, &c., is desirable, especially if the particular estate may expire by effluxion of time before the remainders can vest, or if the particular tenant is likely to commit waste. For, an injunction will lie against him at suit of a trustee to preserve, &c., who, in turn, will be prevented by the court from concurring in the destruction of the contingent remainders.²

A remainder that may be deemed vested is never construed contingent, for, as the courts incline towards holding interests as common law ones, so also do they favor a vesting. It is often, however, very difficult to determine to what class a remainder belongs. The cases on this question are not at all in harmony with principle. Even the common limitation to trustees to pre-

¹ *Doe v. Provoost*, 4 Johns. 61.

² See *Garth v. Sir John Hind Cotton*, 1 White & Tud. Lead. Cas. 604, and notes thereto.

serve contingent remainders is a contingent remainder in point of principle, though the contrary has been repeatedly decided.

In *Olney v. Hull*¹ the devise was to testator's widow while she remained unmarried, remainder on her death or marriage to be equally divided among the testator's surviving sons. This remainder was held contingent. If the testator meant the sons surviving himself, the remainder would have been vested.²

In *Putnam v. Gleeson*,³ the devise was to the testator's daughter for life, and at her death to her heirs and assigns. The remainder was held contingent, as the rule in *Shelley's case* was abolished in the State. But, a remainder to the testator's heirs would have vested at the same time as the life estate.⁴

The English law of vested and contingent remainders is adopted in the American States.⁵ A remainder, however, has always been more readily held than a particular estate in the United States, to be in fee if there was no word of perpetuity in the context, as, to A. for life, remainder to B. Here B. sometimes took a fee,⁶ even before the recent changes in the laws on this point made by several of the States.⁷ The law of remainders' and executory interests is the same in the United States as in England.⁸ As to vested remainders,

¹ 21 Pick. 311.

² *Emerson v. Cutler*, 14 Pick. 108; see *Manderson v. Lukens*, 23 Penn. St. 31.

³ 99 Mass. 454.

⁴ *Abbott v. Bradstreet*, 3 Allen, 587; *Dunn v. Bryan*, 38 Ga. 154; see *Fetrom's Estate*, 58 Penn. St. 424; *Browne v. Lawrence*, 3 Cush. 390.

⁵ 2 Redf. 247.

⁶ *Plimpton v. Plimpton*, 12 Cush. 458.

⁷ See *supra*, chapter 5, on Devises.

⁸ *Miller v. Chittenden*, 4 Iowa, 252; *Pierce v. Hakes*, 23 Penn. St. 231; *Downing v. Wherrin*, 19 N. H. 9.

see further *Young v. Stover*;¹ see further as to contingent remainders, *Evers v. Challis*.²

As an estate will be construed as a remainder rather than as an executory devise, if both constructions are open to the court,³ so an heir under a devise is deemed in by the common law, unless there is a local statute to the contrary.

§ 2. *Executory Devises.*

Executory devises are springing or shifting uses in wills; in other words, future estates that cannot be construed as remainders. Such future estates either have no particular precedent estate, or else do not come into possession exactly on its determination, but either before or after it. To A. for life, remainder to B. in tail, remainder to the heir of C. in fee. Here B.'s estate is a vested remainder, and that of the heir of C. is a contingent one. It may vest in interest during the currency of the preceding estates, though it cannot vest in possession until both A.'s and B.'s estates determine.⁴ But, if the devises were to A. twelve months hence for life, but if B. marry during A.'s lifetime, then to B. here A.'s estate is a springing use and B's a shifting one, inasmuch as it may abridge A's. interest.⁵ If the limitations were to A. for twelve months, remainder to the heirs of B., a person in existence, yet this estate is an executory devise, since it would be void as a remainder, inasmuch as these interests, when contingent, must be preceded by

¹ 37 Penn. St. 105; *Felton v. Sawyer*, 41 N. H. 202.

² 7 H. L. Cas. 531; 29 L. J. 121; 20 L. J. Q. B. 113; *Stephens v. Evans*, 30 Ind. 39; following 38 Mass. 21; distinguishing 21 Pa. 504; 7 B. Mon. (Ky.) 623; 25 Wend. (N. Y.) 115; 2 Denio (N. Y.), 9; 34 Barb. (N. Y.) 388; 28 N. H. (8 Fost.) 459.

³ *Hawley v. Northampton*, 8 Mass. 38.

⁴ *Holme v. Low*, 4 Met. 190; *Ide v. Ide*, 5 Mass. 500, 502.

⁵ *Church in Brattle Square v. Grant*, 3 Gray, 150.

one or more estates of freehold, transmitting an unbroken seisin from the owner. Therefore, under a devise to A. for life, and a year after his death remainder to B., this estate to B. is an executory devise, since it would be void as a remainder, the freehold being in abeyance for a year. The law of executory devises is thus exactly coincident with that of uses. Whatever is good as a use is also good as a devise, and, conversely, while if either can, by possibility, be construed to be a remainder, even though contingent, it will be liable to all the dangers that attend that class of estates.

All future bequests of chattels are executory and not remainders, since such interests can arise only in land or other freehold realty, such as rents and incorporeal tenements, which are the subjects of tenure, and imply one continuous and unbroken seisin. A settlement of chattels, consequently, is void at common law, but is good by way of use or bequest.¹ If the chattels are consumable by use, such as hay, &c., they should be sold, and the interest only of the proceeds given to the tenant for life.² The tenant for life is himself bound to convert them, else his estate will be liable for a *devastavit*. The court will compel him to give an inventory, and, in case of danger, security also, that the property will not be wasted.³ An executory devise cannot be defeated in the United States more than in England.⁴ Therefore a gift over, upon the decease of the first taker without issue living at his death, will operate by way of executory devise, notwithstanding any conveyance by such first taker. An executory devise thus differs

¹ See 2 Kent, 5th ed. 352.

² Patterson v. Devlin, 1 M'Mullan, S. C. 459.

³ De Peyster v. Clendinning, 8 Paige, 295; Clark v. Clark, 8 Paige, 152; see *infra*, chapter 24, on legacies.

⁴ Couch v. Gorham, 1 Conn. 36.

from a contingent remainder both in its capacity of defeating previous estates and in being indestructible itself. As executory devises may defeat previous limitations of the same property, they may be limited on a fee,¹ although no remainder can be limited on a fee. An executory devise that abridges a preceding estate is thus of the nature of a condition subsequent. If it does not arise, the preceding estate will continue according to the terms of its limitation.

The chief characteristic and value of an executory interest, as distinguished from a remainder, is that it is indestructible by the merger, surrender, or forfeiture of a preceding estate. The limitation to trustees to preserve contingent remainders (which indeed is, in point of principle, a mere contingent remainder), is no adequate security for the remainders, and the trustee, unless restrained by chancery, may defeat them.

As any interest, however, that can be construed as a remainder will not take effect as an executory devise, because a common law estate is more favored than an equitable or statutable one, so, conversely, any interest that is at the time of the testator's death executory will not afterwards be deemed a remainder, just as an apparent feehold carved out of a chattel is still a mere term of years determinable on an uncertain event. Where an estate is limited on alternative contingencies, there is no reason why, if failing on one of the contingencies to vest as a remainder, it should not arise on the alternative as an executory devise.²

A fee defeasible by an executory devise is still subject to dower, curtesy, &c., and to all the other incidents of a fee. In *Ide v. Ide*³ ulterior limitations after a fee

¹ *Fisk v. Keene*, 35 Me. 355.

² See 1 Jarm. 790.

³ 5 Mass. 500.

were held to be void, even though the fee could only have been a fee tail, since the remainder-men were brothers of the particular tenant. The decision seems to have proceeded on the ground of repugnancy, which is a difficulty the courts will in most cases remove by construction. As executory interests are indestructible, they are subject to the rule against perpetuities.¹

§ 3. *Cross remainders.*

As the word "heirs" is never implied in a deed, a cross remainder by implication can only arise under a will. Cross remainders are of this nature: Where lands are devised to several persons, say parceners, as tenants in tail, and, if they die without issue, or on failure of their issue, remainder over, the question arises on the death of one of the tenants in tail whether her or his share goes to the other tenants in tail or to the remainder-man. When the shares go, as is usual, to the surviving tenants, they are termed cross remainders.²

Formerly it was thought that the context should be strong in order to raise an implication of cross remainders between more than two. Jarman³ accounts for this singular notion by the fact that in *Gilbert v. Witty*,⁴ where this strange doctrine was first propounded, the devisees had not undivided shares in common, but were devisees respectively of separate tenements. However, cross remainders will now be implied under either kind of limitation, and, as regards the number to which such implication may extend, there can be in reason no limit except the number of primary devisees. The implication is not affected by any State statute respecting the meaning of the word "issue," since those enactments

¹ See *infra*, "chapter 26, on Void Testamentary Gifts, § 1."

² *Holmes v. Meynell*, Raym. 452.

³ Vol. II, 459.

⁴ Cro. Jac. 655.

only operate where the will is wholly silent on the question.

The doctrine that there cannot be a possibility upon a possibility appears in several phases of our law. The old rule that cross remainders could only be implied between two seems to be a development of this doctrine, which was invented before it was established that contingent remainders were destructible. The presumption as against implying numerous cross remainders, indeed, arose from the inclination of the courts towards vested interests. But this also sprang from the fear of a contingent perpetuity. It is safe to say that the doctrine that there cannot be a possibility upon a possibility holds now in our law only in the particular case of invalidating a limitation to the unborn child of an unborn child.

But express cross limitations, as at a certain age of the devisees, or if they die under a certain age, will, as a rule, preclude all implication. If the express limitation, however, be to another class of devisees, or relate to other contingencies than those on which the limitation over is dependent, the presumption thence arising is not conclusive against the implication.¹ The question, therefore, as to what kind of context will imply cross remainders in a particular class of devisees in tail is often very perplexing in England, and, as our system of settlement becomes developed, will also become troublesome here.² As the common law favored the consolidation of inheritances, it ought to be supposed to favor cross remainders; yet the dicta, (as distinguished from the cases,) are to the contrary.³ The implication, how-

¹ *Vanderplank v. King*, 7 Jur. 548; *Atkinson v. Barton*, 10 W. R. 281.

² See *Parker v. Parker*, 5 Met. 134; *Rabbeth v. Squire*, 4 De G. & J. 406.

³ *Davenport v. Oldis*, 1 Atk. 579.

ever, is most convenient. In one case its rejection would have entitled a plaintiff to have recovered twenty-five undivided three hundred and sixtieth parts.¹ The phrase "in default of such issue," therefore, will usually raise the implication, unless there is appended the word "respectively," or the like;² though the word "respective," indeed, in the later cases, is justly considered as without weight,³ since it only expresses what every tenancy in common implies.

In executory trusts the implication will not be excluded even by an express limited direction as to cross remainders.⁴ The reason is that articles⁵ and executory limitations are only considered in equity as imperfect heads of agreement, to which even the potent rule in Shelley's case is inapplicable. Under such instruments, therefore, cross remainders will be implied, not only between children, but also between families.⁶

Cross remainders will be implied, too, not only amongst a whole class of devisees,⁷ but also amongst devisees mentioned by name, or different branches of issue. Convenience was the principle upon which the judges originally sought to consolidate inheritances by implying cross remainders. The same regard to convenience has now led to the extension of the implication to any number or kind of devisees, although judges of the eminence of Lord Hardwicke and Lord Mansfield⁸ placed some technical and temporary barriers against

¹ *Doe d. Gorges v. Webb*, 1 Taunt. 234.

² *Combez v. Hill*, 2 Stra. 969.

³ *Green v. Stephens*, 17 Ves. 64.

⁴ *Burnaby v. Griffin*, 3 Ves. 266.

⁵ *Duke of Richmond's case*, 2 Coll. Jur. 347.

⁶ *Horne v. Barton*, Geq. Coop. 257.

⁷ *Green v. Stevens*, 17 Ves. 75.

⁸ *Phippard v. Mansfield*, Cowp. 797.

raising the implication amongst more than two. Even Blackstone, in his Commentaries, acquiesces in the same views.

The implication, of course, cannot arise without subsequent words; but the addition of the phrase "with remainder" over has been held sufficient to raise the implication.¹ The implication applies to estates for life and, *semble*, so far to chattels as well as to estates tail,² and also to both tenants for life and in tail together where there is a remainder in tail to the issue (as purchasers), of the tenants for life.

Jarman³ considers that the implication does not apply to executory devises in fee, or to bequests of personalty. Unless the rule against perpetuities, however, or the incidents of personal property which do not admit of its being entailed with a remainder over, are involved, it does not appear that Jarman's view is at all borne out by the cases he cites. There appears to be no reason whatever for excluding the doctrine from any kind of settlement or of property. Where there is a gift to several persons of the whole interest, with a limitation over in case they die under age, it is surely more reasonable to give those who attain age the shares of those who die during minority than to suffer those shares to pass to the infant's representatives, who, if they are not his issue, certainly are no objects of the testator's bounty. Among the early cases Jarman admits that the implication was applied to executory devises in fee.⁴ It is doubtful whether the later cases have in the least altered the original current of decisions on this

¹ Doe *v.* Burden *v.* Burville, 2 East. 47 n.

² 2 Jarm. 478; Ashley *v.* Ashley, 6 Sim. 358.

³ Vol. II, 482.

⁴ See Scott *v.* Bargeman, 2 P. Wms. 68.

point. In *Skey v. Barnes*,¹ which Jarman regards "as a leading authority on this point, Sir W. Grant expressly held, as to the shares in question, that the contingency had not happened on which they were to be divested."

Great thanks are due to Jarman for his classification of the nebulæ of testamentary decisions, but he sometimes seems to err in point of philosophy when he regards the "wilderness of single instances," as collated by himself or his predecessors, as mutually presenting points of affiliation and resemblance to doctrines of regular conveyancing. For one phase of mutual agreement which the cases cited under each doctrine present, we sometimes find fifty of difference and antithesis. As to *Skery v. Barnes*, it is absolutely of no authority on the point in question, as Sir W. Grant, indeed, declared. Not only had the contingency not happened on which the shares were supposed to be given over, but the shares were not given over at all, but a wholly different interest. The testator's children in that case took all his personalty in default of appointment, while the limitation over was only of two pecuniary legacies of £1,000 and £1,500, respectively. If Jarman's doctrine is sound, that cross remainders will not be raised on executory devises in fee, or on gifts of personalty, the doctrine would be inoperative throughout most of the United States where estates tail are abolished or modified; but his position on this head, though supported with his usual strategy, seems naturally weak and unsuited to the purposes of convenience to which the doctrine mainly, if not solely, owed its first rise. To raise the implication, of course, the limitation over must be on failure of issue of *all* the previous devisees.²

¹ 3 Mer. 334.

² See *Doe d. Gorges v. Webb*, 1 Taunt. 234.

In *Powell v. Howells*,¹ A. devised a moiety of land to and between B., C. and D., and to the heirs of their bodies, respectively, and, in default of such issue to any of them, to M., her heirs and assigns. The word "any" was construed "all," and cross remainders were implied between B., C. and D.

Cross remainders are a peculiar phase of implication. Raising estates by implication, as distinguished from a *cy pres* reformation of the text, depends on the limitation over. If this creates a hiatus, the previous limitations being understood literally, these will be expanded so as to prevent an intestacy *pro tanto*, and will provide for the devolution of the interest while *in transitu* to the express limitation over. Therefore, not only cross remainders between persons to whom estates are expressly limited, as well as an enlargement of an express life estate will be inferred from a limitation over, on the previous donee's dying without issue, but an estate will often be implied to a person who is no direct object of gift at all, where the limitation over or the general context implies that there is to be no breach or gap in the series of limitations or any partial intestacy of the owner as to the property in question.

Implications of estates, besides being unknown in deeds, are, in point of fact, not so necessary in such instruments, which are, 1, more carefully drawn, and which, 2, usually create equities by part performance, and thus let in a flood of parol evidence that is inadmissible on a question of construction between different classes of volunteers under wills.

Where there is a remainder to each of the "survivors" in tail, with a limitation over on failure of issue of all the devisees, the word "survivor" will be construed

¹ Law Rep. 3 Q. B. 654.

“other,” and the donees will take cross remainders by express limitation either in a deed or will.¹ In a deed, however, the phrase “heirs of the body” must be used, and not “issue,” to raise an entail either expressly or by implication.

An implication of cross remainders may, of course, be made amongst tenants for life of chattels.² But where the gift over is to the survivors, and there is no gift over on failure of issue of all the donees, the word “survivor” will be construed strictly, and no implication will be raised.³

¹ *Smith v. Osborne*, 6 H. L. Cas. 375.

² *Pearce v. Edmeades*, 3 Y. & C. 246.

³ *In re Corbett's Will*, Johns. Eng. Ch. 591.

CHAPTER XI.

SETTLEMENTS OF PERSONALTY.

An express or implied limitation of personalty, by deed or will to one in tail, gives him the absolute interest, and on his death the personalty goes to his next of kin by operation of law, and not to his issue in tail. This is rule of law which cannot be directly evaded.¹ A *cy pres* construction is, therefore, never applied to limitations of personalty, because, a quasi entail therein would enure to the benefit of the executor, and not the issue of the tenant in tail, if he did not dispose of the property.

It has been repeatedly decided in the United States that a limitation of personalty in tail, gives all to the donee in tail, or, rather to the tenant of the conditional fee on performance of the condition. There can be no remainder limited after a vested entail of personalty.² This rule prevails in Tennessee,³ and most other States. Settlements of personalty should therefore contain a clause, that no unborn issue in tail should take a vested interest in the personalty, until he attains legal majority. On his death under age, the remainder then will take effect. Personalty nevertheless can be settled anywhere by will or deed, just as if it were realty, pro-

¹ 2 Kent Comm. 5th ed. 353; 4 Ib. 283; Smith's Appeal, 23 Penn. St. 9; Moody v. Walker, 3 Ark. 147.

² Ellis v. Merreniack Bridge, 2 Pick. 243; Homer v. Shelton, 2 Met. 194; Exrs. of Moffat v. Strong, 10 Johns. 12; Paterson v. Ellis, 11 Wend. 259.

³ Clark v. Clark, 2 Head, 336.

vided, that the non-vesting clause referred to is inserted, when necessary.¹

Rules of law, however are to be distinguished from rules of construction. Chattels, therefore, cannot be made to devolve as heir looms, but will under such a direction vest absolutely on the first taker,² since a *cy pres* construction is not applied to limitations of personalty.

Still, personal estate if confined within the bounds of perpetuity can be settled by will or in trust in the same manner as realty, provided that there be inserted a clause that no unborn person is to take a vested interest in the chattels, until he attains age. If this clause is omitted, the first *quasi* tenant in tail of the chattels takes an absolute interest, and all the ulterior limitations are void, while if the child dies before he has the capacity to bequeath, the chattels go to his next of kin, and not exclusively to the tenants of any real estate, put in strict settlement with the chattels.

Even with the non-vesting clause, when a child tenant in tail of the chattels attains age, all the ulterior limitations then become absolutely void. But, remainders similarly limited after an entail of freeholds, where such a mode of settlement is legal, remain firm until the tenant in tail obtains possession of the land, or with the consent of the particular tenant dis-entails the estate by a positive act. The remainders of freehold are thus defeasible only, and not void, like remainders after a *quasi* tenancy in tail of chattels.

A person taking a residue for life is entitled to the proceeds, from the death of the testator.³

¹ See *Dunn v. Bray*, 1 Cal. 294.

² *Vaughan v. Burslem*, 3 Br. C. C. 101.

³ *Lovering v. Minot*, 9 Cush. 151; 2 Wms. Exrs. (2 Am. ed.) 997 *et seq.*; *Chestnut v. Strong*, 1 Hill Ch. 123; *Williamson v. Williamson* 6 Paige, 298.

Jarman considers that words of distribution are not sufficient to control the operation of the rule in Shelley's case under a limitation of personalty to A. and the heirs of his body. But, a ready answer to Jarman's opinion is the fact that the rule is inapplicable, except by analogy to interests in personalty, and to make a shadowy analogy a ground for extending a cast-iron rule of tenure is to carry a so called principle, or rather one set of principles exclusively, to a most inconvenient extreme. Much learning hath made many somewhat extravagant in respect to the rule in Shelley's case. In England, Jarman's opinion would probably be followed, but it is certain that in America the issue in tail would under words of distribution to them be held to take by purchase. The early cases are admitted by Jarman to be against his view of the question,¹ and he admits that if the limitations be to A. expressly for life and after his decease to his issue as tenants in common, the rule ought not to be applied.

There can be any number of remainders, or rather executory interests in chattels alternative to a limitation in tail, provided this limitation is kept contingent; as for instance, to A. for life, remainder to his first and other sons in tail, remainder to B. Here if A. never has a son, B's remainder is good. But, when once a son is born to A.; the child takes the absolute interest, unless its vesting is postponed by an express clause to some period within the line of perpetuity. An entail of personalty being equivalent to a fee in realty, there can be no remainder after it, but, as an executory devise may be attached to a fee, so may a similar limitation be appended to an entail of personalty. Such a contingency must of course be on a collateral

¹ Jarman, Vol. II, 492.

event.¹ Thus, under a limitation of personalty to A. and the heirs of his body, and, if A. die without heirs of his body, to B., this limitation to B. is void as a remainder after an absolute interest. But, if the limitation be on an event collateral to the entail, as to A. and the heirs of his body, and if he die without heirs of his body, B. living, then to B., this executory bequest to B. is valid. So if the contingent limitation was to B. if he returned from Rome, just as under a devise to A. and his heirs, and if he die without heirs to B., this limitation to B. is void. But if it is to B. when he returns from Rome, the gift is good. The authority of Jarman is in favor of the position that under a bequest to A. for life, and if he die without issue to B., A. will take under the § 29, 1st Vict. c. 26, and the analogous American enactments, only an estate for life, while his issue take nothing. Jarman says "that under such limitations the construction is free from doubt." But this seems rather doubtful in the absence of adjudication on the point. The context implies a benefit to the issue, either through their ancestors, or by purchase. However in England, probably they would be held to take nothing.

¹ *Lamb v. Archer*, Salk. 225.

CHAPTER XII.

EQUITABLE CONVERSION.

§ 1. *Its Nature.*

A direction in a will to convert land into personalty or, conversely, to invest personalty in land, or to sell and exchange, operates at once to change the nature of the property into the kind contemplated by the testator. The gift is so to be construed. For, equity deems that as done which ought to be done. The beneficiary, therefore, takes the gift as land or money according to the direction to convert.¹

If the testator directs a sale of his land, the proceeds to be divided, the devisees take their respective interests as personal estate,² and, even if the trusts fail, the fund is personal and falls into the residue.³ The validity and construction of the will, too, will depend on the question whether the limitations are valid as to personalty, but not as to realty,⁴ unless there is a fraud intended to be committed in respect of some statute or rule of public policy.

Money directed to be laid out in land, is thus realty to all intents, and passes under a devise of lands, tenements, and hereditaments.⁵ But, the power to convert

¹ *Lorillard v. Coster*, 5 Paige, 172, 218; *Hawley v. James*, Id. 318, 344; *Bolton v. De Peyster*, 25 Barb. 539; *White v. Howard*, 52 Barb. 294.

² *Drake v. Pell*, 3 Edw. 251; *Meakings v. Cromwell*, 5 N. Y. (1 Seld.) 136.

³ *King v. Woodhull*, 3 Edw. 79.

⁴ *Kane v. Gott*, 24 Wend. 641; compare *Savage v. Burnham*, 17 N. Y. (3 Smith) 561.

⁵ *Lingen v. Sowray*, 1 P. W. 172.

must be an imperative trust power, and not a mere discretionary one, else no constructive conversion takes place,¹ and the property, until the power is exercised, devolves according to its original character as realty or personalty, and if real, it pays in legacy duty. But, if the direction to convert is imperative, the legatee cannot evade legacy duty by electing to take the property in the shape of land.²

If the disposition be illegal, if the property continued real, the conversion will not be deemed to have been made for the purpose of avoiding the illegality.³ Even if the conversion of the realty is postponed until a future date, it will be still regarded as personalty, with respect to the validity of the direction to convert.⁴ But, if one domiciled in New York, devises lands in another State, to be sold for illegal purposes, the trusts are void in New York State, and the trustees will be compelled to convey to the heir.⁵

An unexercised discretionary power never works a conversion.⁶ If the will merely "authorizes and empowers" a sale, the power is discretionary, and not in trust, if the beneficiaries are the same under the power and in default of appointment.⁷

If land is directed to be sold, and the proceeds to be invested in land, the fund continues real, but, if the re-investment is to be with consent, then, it is personalty

¹ *Grieverson v. Kirsopp*, 2 Keen, 653.

² *Attorney General v. Hulford*, 1 Price, 426; *Attorney General v. Ramsay's Trustees*, 2 Crompt. M. & R. 224 n.

³ *Wright v. Method. Epis. Ch. Hoffm.* 202.

⁴ *Vail v. Vail*, 7 Barb. 226.

⁵ *Hawley v. James*, 70 Paige, 213.

⁶ *Slocum v. Slocum*, 4 Edw. 613; compare *Smith v. Kearney*, 2 Barb. Ch. 533.

⁷ *Harris v. Clark*, 7 N. Y. (3 Seld.) 242; see *infra*, chapter 17, § 2 on "Precatory trusts."

meantime. So, if the first sale is discretionary, the fund continues real. The direction to convert must be absolute, in order to alter the character of the property,¹ or, its investment at discretion or interest must be merely a temporary device, until a fitting investment can be had. But, if the trustees have really a discretion as to the conversion, they can at their option alter the devolution of the property as between the real and personal representatives of the beneficiary, or even as between the heir and the beneficiary,² or, if the vesting depend on the sale, the trustees can suspend the vesting.

Where property is directed to be converted for certain purposes, the residue results to the heir or next of kin as realty or personalty, according to its original nature,³ A like rule obtains if the trusts would exhaust the fund, but some of them fail by lapse or invalidity.⁴

The court will, as a rule, regard the beneficiary as entitled to the property, even prior to conversion, and to the proceeds from the time of the testator's death, rather than suffer his interests to depend on the action of the trustees.⁵ Where money is at loan on high interest, and bad security, the executor would, it is thought, be justified in paying a lower rate of interest to the tenant for life of such moneys, and also in capitalizing terminable, and fleeting annuities. But, unless such directions are contained in the will, it is often doubtful whether an executor would be justified in capitalizing or converting in

¹ Thornton v. Hawley, 10 Ves. Sumner's ed. 129 a.

² Brown v. Bigg, 7 Ves. Sumner's ed. 279, note.

³ 2 Story Eq. Jur. 790, note.

⁴ See Ackroyd v. Smithson, 1 White & Tud. Lead Cas. note.

⁵ See 2 Story, Eq. Jur. 790, note; *sub fin.* Gibson v. Bott, 7 Ves. Sumner's ed. 89, note.

any way terminable or other annuities specifically bequeathed in settlement since the testator might have intended certain peculiar advantages for the donee for life.¹ The case is different from a settlement of general personality or residue.

A testator owning real property in New York and Connecticut, expressly gave to his executors power of sale over the land in Connecticut and directed the whole estate given "to be conveyed, transferred, and paid in fee simple" to &c. It was held that the doctrine of equitable conversion could not be applied to the land in New York.²

If no time is appointed to execute a power, the period for its exercise will depend upon the trusts. If these are immediate, equity will regard the conversion as made at the time of the testator's decease, or at least within one year thereof.⁴ An unlimited discretion in the trustees as to the time of making the conversion does not affect this rule, where the delay to exercise the power cannot affect the interests of the beneficiaries. Where the period for conversion is deferred, the property retains its original character until then.⁵ Where the will directs a sale from time to time, the conversion takes place constructively at once on the death of the testator. Any time given to the executors will not be deemed discretionary, but merely to mean a reasonable time, even though the executors are em-

¹ See, contra, 1 Jarm. 546; *Howe v. Earl of Dartmouth*, 7 Ves. Sumner's ed. 173, note.

² *White v. Howard*, 52 Barb. 294.

³ *Dominick v. Michael*, 4 Sandf. 374.

⁴ *Hoxton v. Corse*, 2 Barb. Ch. 506.

⁵ *Bunce v. Vander Grift*, 8 Paige, 37.

powered to leave a third unsold for the benefit of the widow.¹

The beneficiary may elect against the proposed conversion, provided that such option does not affect the interests of other beneficiaries,² and that a sale has not been previously made by the executors.³

¹ *Arnold v. Gilbert*, 5 Barb. 190.

² *Reed v. Underhill*, 12 Barb. 113.

³ *Osgood v. Franklin*, 2 Johns, Ch. 1.

CHAPTER XIII.

TESTAMENTARY GIFT.

§ 2. *Resulting Trusts.*

When a testamentary gift fails by reason of invalidity or disclaimer, there is an intestacy *pro tanto*, if there is no residuary clause, and the property goes to the heirs or next of kin.¹ So, if the trusts of a gift are not co-extensive with the legal interest, there is a resulting trust of the remainder, as in the case last put.² Sometimes it is difficult to determine whether the trustee does not hold the surplus to his own use. If the devise is merely subject to debts, the devisee holds the surplus for his own benefit. But, if it is in trust to pay the testator's debts, the devisee is a trustee of the surplus undisposed of, which he holds for the benefit of the testator's heirs or representatives, as on an intestacy *pro tanto*, unless there is a residuary clause³.

Parol evidence is not admissible to rebut resulting trusts of this nature, since these are in conformity with the letter of the will, and are therefore, inferences of construction, and not equitable presumptions, which conflict with the text of the will, and contradict it.⁴

¹ *Bogert v. Hertell*, 4 Hill, 492; *Hartop's Case*, 1 Leon 253.

² *Roper v. Ratcliffe*, 9 Mod. 171.

³ *King v. Denison*, 1 Ves. & B. 272; see *Stevens v. Ely*, 1 Dev. Eq. 493; *Wood v. Cove*, 1 Paige, 472; *Ackroyd v. Smithson*, 1 White & Tud. Lead Cas. & notes.

⁴ See *Lewin on Trustees*, p. 181, *et seq.* and the cases there cited.

If the trusts of property directed to be converted fail, either wholly or in part, there is a resulting trust so far to the heir or next of kin.¹

Where several kinds of wealth are given to trustees, but the trusts declared are not in terms applicable to all the descriptions of property, there is no necessary implication that the trusts extend to more kinds than those described.² A like rule applies where all the trusts relate to all the various kinds of property in the common fund, but are not co-extensive with the legal interest in the trustees. Thus, in *Davis v. Davis*,³ the devise was, "It is my wish that my brother S. be my executor, to arrange, dispose of, and settle all my affairs, and I appoint him guardian to my daughter." It was held the daughter took no interest under the will. The case of *Newland v. Shepard*, *contra* is not now of any authority.⁴

Where there is a devise in trust to sell to pay debts, or for any other limited purpose, any surplus belongs to the heir, even though he get by the will a particular portion of the proceeds of the sale, unless this gift is absolutely inconsistent with his heritable rights. The doctrine of a resulting trust to the heir is the converse of presuming estates by implication in strangers. The construction must be cogent and irrefragable in the opposite direction before the heir can be deprived of any portion of his common law rights. Terms of mere endearment to the devisees in trust will not constitute them beneficiaries.⁵

If the portion of the realty comes to the heir as a chattel, it devolves upon him as personalty, and, on his

¹ *Wood v. Cone*, 7 Paige, 471 ; *De Peyster v. Clendining*, 8 Id. 295.

² *Stubbs v. Sargon*, 2 Keen, 255.

³ 1 Russ. & My. 210.

⁴ 2 P. W. 194.

⁵ *Wych v. Packington*, 3 Br. P. C. Toml. Ed. 44.

intestacy, goes to his next of kin and not to his heir.¹

There is no resulting trust in England to the heir in case of a gift to a charity. Any surplus will be applied to other charities of a similar nature. In North Carolina, however, and in most, if not all of the United States, a trust for charities will not be executed *cy pres*. In that State, accordingly, there may be a resulting trust for the heir from the surplus of a fund given to particular charities.² In Massachusetts,³ and probably all other States, the English doctrine would not be carried out to its full, or any extent, in behalf of charities where the context of the will was silent on the point.

If a particular tenant disclaims,⁴ the remainder man takes at once, and not the heir. If a particular limitation, however, is void, the heir is let in, unless the gift is not of the land, but of a term, or charge on it, and there is a devise of the land subject to the incumbrance. In this case, if the term or charge becomes satisfied, this will operate for the benefit of the devisee, and not of the heir.⁵

If there be a devise to A. on his attaining twenty-one, but in case he die under age, then to B., the heir at law takes until A. attains age, or the contingency happens. It is very hard to lay down any rules for determining when the heir's rights are excluded by implication. All that can be distinctly noted in the abstract is, that in a really doubtful case the presumption of law will be in his favor. The old, strict rule, indeed, that any

¹ *Levet v. Needham*, 2 Vern. 138.

² *McAuley v. Wilson*, Dev. Eq. 276.

³ See *Casterbrooks v. Tillinghast*, 5 Gray, 17, *infra*; chapter on "void testamentary gifts, § 6 Charitable uses."

⁴ *Adams v. Gillespie*, 2 Jones, Eq. N. Car. 244.

⁵ *Davidson v. Foley*, 2 Br. C. C. 203; see *Sidney v. Shelley*, 19 Ves. 364.

presumption to the contrary should be a necessary one[#] is perhaps now broken down. But still, doubtless, such an adverse presumption must be a strong and cogent one, all the clauses of the will being considered, and sought to have effect given to them. The presumption of law thus stated will, certainly, be extended to next of kin as well as the heir in most cases, if not in all. Indeed, with respect to the present point, the heir is not more favored than the next of kin. The favors he receives relate to rules of law and incidents of property, and not to rules of construction.

Every conversion, however absolute in terms, will be deemed a conversion for the purposes of the will only,¹ unless the testator directs to the contrary, so as to affect the trusts that will otherwise result to his heir or next of kin so far as the trusts fail by lapse, or invalidity, or the non-performance of a condition, or the non-happening of a contingency specified.² A declaration that the proceeds of a sale of land should be deemed personalty was held in *Countess of Bristol v. Hungerford*³ not to affect the right of the heir to the undisposed of proceeds of the sale. The authority of this case is endorsed by Jarman and by Lord Brougham in *Atty. Gen. v. Henchman*.⁴ Yet, it is certain that it would not be followed in America, especially as it seems to be overruled by *Phillips v. Phillips*.⁵ Even a conversion for certain specified purposes formerly did not let in simple contract creditors in England, although the fund could only be administered by the Court of Chancery.

¹ See *Fletcher v. Ashburner*, 1 White & Tud. Lead. Cas. 659, 2d ed.; and *Ackroyd v. Smithson*, *Id.* and notes thereto; Am. ed. 690.

² 1 Jarm. 559.

³ 2 Vern. 645.

⁴ 2 My. & K. 484.

⁵ 1 Russ. & My. 649.

Nor will the residue undisposed of even now pass there by a general bequest of personalty in the same will, unless there is a declaration in the will that such residue is to be deemed personalty,¹ or it is thrown into a mixed fund, and there is a general residuary legatee.²

Unless the testator has directed a conversion out and out, and not merely for specified purposes, the residue retains its original character and incidents of realty or personalty, as the case may be. There is no equity between the heir and next of kin, to put the court in motion in such cases.³ But if the testator directs an absolute sale of land and bequeaths the proceeds to A., who dies after surviving the testator, the property goes to A.'s next of kin, and not to his heir. Land of an infant, sold pursuant to a license of court, also becomes personalty, and goes to the infant's next of kin. So do damages paid for the land of an infant taken for public use.⁴

The heir or residuary devisee is entitled to a sum expressly excepted out of the proceeds of land directed to be sold, or the trust of which is void.

Where a partial interest in lands directed to be sold results to the heir, it is personalty in his hands; *aliter* if all the trusts for conversion fail.⁵

A security taken upon a sale of land directed to be converted is, like the land itself, personalty, and can be conveyed with a good title by any of the executors to a *bona fide* purchaser.⁶

¹ Collins v. Wakeman, 2 Ves. Jun. 683.

² Hutcheson v. Hammond, 3 Br. C. C. 148.

³ Evans v. Kingsbury, 2 Rand. 129; see Holland v. Cruft, 3 Gray. 162.

⁴ Emerson v. Cutler, 14 Pick. 108; see Holland v. Adams, 3 Gray, 190.

⁵ Smith v. Claxton, 4 Madd. 493

⁶ Bogert v. Hertell, 4 Hill, 492.

Parol evidence is never admissible to rebut a resulting trust¹ to the testator's heirs or next of kin. The statement in Jarman² to the contrary is erroneous. Parol evidence is admissible only to rebut or support equitable presumptions that are contrary to the letter of the will, as in the case of double portions, repetitive legacies, and the like. But the evidence has no relation to presumptions founded upon the construction of a particular will, and in accordance with its letter.

¹ See *Supra*, Part I, 274.

² Vol. I, 357, Am ed.; query as to *Jones v. McKee*, 3 Barr, Penn. 496.

CHAPTER XIV.

IMPLIED GIFTS.

An interest is impliedly given to one when he is referred to in a will in an indirect manner, yet with such relation to a direct gift to another as to show that the testator intended for him a benefit, which is reflected from the terms of the direct gift. The implication, when it arises from the relationship of any of the parties to the testator, cannot, doubtless, be supported or impugned by parol evidence. This must be confined to the fact of the relationships. When an implication arises solely on the construction, parol evidence is not admissible. As to parol evidence in relation to equitable implications, see, *supra*, Part I.¹

However, an heir or next of kin is held to be disinherited only on a necessary implication. This tends to give certainty and consistency to this branch of testamentary law, which, as it relates to the words of donation and not merely to the subject or object of gift, is not open to parol evidence.

The implication must be stronger than a mere conjecture, and must be the only conceivable inference on the particular point.² A numerous class of interests by implication arises with respect to precatory powers, where the terms either give the donee an implied life interest, or else the whole property, if the direction to

¹ 264, *et seq.*

² Rathbone v. Dyckman, 3 Paige, 9; Grout v. Hapgood, 13 Pick. 164, Jackson v. Billinger, 18 Johns. 368.

convey in trust is not sufficiently mandatory. An express gift of course precludes all implication on the same point.¹

It has been frequently held that an heir-at-law can be disinherited only by necessary implication.² Thus, a devise to him after the death of A. gives A. a life estate by implication. But a devise to B., *a stranger*, after the death of A., gives A. no life estate by implication. The inference does not arise in the case of a devise to one of several co-heirs, or to a son who is not the heir-at-law at the time of making the devise.

Where there is a devise to the heir and other persons after the decease of A., the ground for necessary implication does not exist. Yet, the contrary was held in *Blackwell v. Bull*,³ although, of course, the testator might have meant that the heir was to take the intermediate interest during A.'s life.

If the devise to the testator's heir be in case A. die without issue, then A. takes an estate tail by implication, if the meaning of the word issue is not affected by a local statute. So, under a devise to A. for life, and if he die without issue then to B., A. takes an estate tail. So if the devise be to B. in fee in case of A., the testator's heir dying without issue, A. takes an estate tail, unless the meaning of the word issue is abridged by statute. If the devise be to A. for life, and if he die without issue living at his death, then over, the issue would seem to take an estate tail by implication;⁴ else the property goes neither to them nor to the remainder man as Jarman justly observes.⁵ A devise after the general failure of issue of any one, be it re-

¹ *Joiner v. Joiner*, 2 Jones Eq. 68.

² *Roosevelt v. Fulton*, 7 Cowen, 71.

³ 1 Kee, 176; see *Dashwood v. Peyton*, 18 Ves. Sumner's ed. 27, 49.

⁴ See *Mandeville's case*, Co. Litt. 26 b.

⁵ Vol. I, 490.

membered, is void for remoteness, unless the propositus take either expressly or by implication an estate tail.

Where the income is disposed of during the joint lives of several, with a gift over on the decease of the survivor, all the intermediate interest accruing between the determination of the joint lives and the death of the survivor, belongs to the survivor, by the right of accruer incidental to a joint tenancy.

A devise to B., after the death of A. under age, will give A. an estate by implication if B. is the testator's heir, just as if the devise were to him simply after the death of A. But this inference does not arise if B. is a stranger. The estate, however, which A. will take is not necessarily a fee, since the inference is not unavoidable that he is to take merely a life estate when of age.¹

If land be devised expressly or by implication to A. in fee, and, if he die under age or without issue, or subject to any other legal contingency, over, the word or will be construed and, so that the devisee over will not take unless both the specified contingencies happen. But if the devise be to A. for life or in tail, this rule does not apply.² Its object is to benefit the issue by descent and not by purchase. But this aim is precluded when the propositus is only tenant for life, and is not necessary where he is already tenant in tail. Only for the double contingency the devise in fee to the first taker would be cut down to mean an estate tail, a son a devise to A. and his heirs, and if he die without heirs of his body to B., this gives A. only an estate tail. But under the rule in question he takes not an estate tail with a remainder over, but a fee subject to an executory devise.

¹ 1 Jarm. 480, note

² *Fairfield v. Morgan*, 2 B. & P. N. R. 38.

³ *Mortimer v. Hartley* 6 Exch 47

In wills, when the word issue points to the death of the propositus and not to a general failure of his issue, Jarman thinks that under a devise to him for life, and if he die without issue remainder to B., the issue take no estate by implication. This, doubtless, is the true rule if the rights of the heir are not to be invaded except by necessary implication; but this particular question has been so fenced by authorities on the meaning of the word issue as an inheritable term significant of *heirs* of a particular kind that the word seems to give the issue estates by implication. The object of the statutory rule which cuts down the meaning of the term issue, is to prevent the limitation over from being void where the preceding donee does not take an estate tail, and not to abridge estates impliedly limited by the context. But where the limitation over is on a failure of the issue of a person who is no relative of the testator, and to whom no interest is given, the same reason for implying an estate in him or the issue does not exist. It may seem bold in me to impugn the positions of an author on whose resources I have so largely drawn. The weakness of my attacks, however, against such a giant renders further apology from me unnecessary.

If there is a preceding express devise for life of part of the lands, to the person on whose death the devise in question is to take effect, implication is avoided, and the devisees over take immediate estates in the rest of the lands, and a remainder after the decease of the tenant for life in the lands devised to him.¹ A residuary devise also rebuts any implication of the kind now under inquiry. Jarman

¹ Cook v. Gerrard, 1 Saund. 183.

thinks¹ that where the will contains a residuary devise, a devise of particular lands to the residuary devisee, after the death of A., a stranger, gives A. an estate for life by implication. But, a residuary devisee is not as favored in law or equity as an heir-at-law. There is **not** the same presumption in his favor, nor any *a priori* presumption at all that he is universal residuary devisee. Consequently there is not the same ground for implying an estate in A. when the residuary devisees enjoyment of certain lands is postponed until A.'s death. A thousand reasons might have each of them influenced the testator to make such a disposition of the particular lands.

The case of *Harman v. Dickinson*² exemplifies the extent to which the courts will go in construing a devise according to the intention, even where the words used are by no means adequate to declare that intention with any degree of accuracy. There was a bequest to two grand-daughters by name of equal sums for life, and to their children respectively. But, if either died without issue, her share was to go to the children of the surviving one. One married and died leaving children; and, subsequently, the other died unmarried. The children of the first were held entitled, though not children of the "surviving grand-daughter." So, a bequest to several during their joint-lives enures to the survivor.

A devise of land over after the death of the wife gives a life estate to the wife and a fee to the devisee by implication. So a devise to B., on A.'s dying under twenty-one, implies that A., if he attains age, is to have a fee.⁴ Implying a life interest in this way, it is said,

¹ Vol. I, 475.

² 1 Br. C. C. 91.

³ *Smith v. Oakes*, 14 Sim. 122; see chapter 16 on "Survivorship," *infra*.

⁴ *Cassell v. Cooke*, 3 Serg. & R. 290.

will not be done if the subject is personalty.¹ Yet the widow not being heir does not take the whole realty on intestacy. There seems, therefore, to be every reason to contend, on the principle of *Cassell v. Cooke*, that the rule in question applies to personalty. Such cases are distinguishable from residuary devises wherein the beneficiaries take nothing whatever by act of law but only by construction of the will. The doctrine of implication is not one of tenure, according to which the heir alone is favored, but is one of construction generally, although it may happen as an indirect consequence of the favor with which the heir is regarded by the law, that he is held to take where an implication would be raised if the disposition related to personalty.

It has been thought that a devise to the survivor of several persons gives estates to all by implication. But this is doubtful.² The implication is not a necessary one, and the heir, it is to be remembered, is not to be disinherited on a mere conjecture.³

An exception, however, of part of certain property may operate as an implied gift of the remainder, or even as an execution of a power over it.⁴ And where a testator has omitted words which are necessary to express the meaning intended, and the intended meaning is clearly inferable from the rest taken as a whole, the court will by construction supply the omitted words.⁵ A testator made no other provision for his widow than the following: "After paying my debts, I give to my beloved wife, C., in trust for the maintenance of herself

¹ *White v. Green*, 1 Ired. Eq. 50.

² See *Saunders v. Low*, 2 Sir W. Bl. 1014; *Wainwright v. Wainwright*, 3 Ves. 558.

³ *Manigault v. Deas*, 1 Bail. Eq. 298; *Rathbone v. Dyckman*, 3 Paige, 9.

⁴ *Walker v. Mackie*, 4 Russ. 76.

⁵ *Kellogg v. Mix*, 37 Conn. 243.

during her life, and of my daughter E., so long as she remains single, and to my son G., \$400 a year to be paid by my trustees." A previous clause had given the entire property to trustees for purposes to be afterwards stated in the will. No other disposition of the income, which was \$4,000 a year, was made during the life of the widow; but the income was given to his children after her death, and any appropriation of the principal of any part of the estate before her death was forbidden unless with her consent, and she was to have the entire use of her portion of the estate until her death.¹ It was held that the testator intended to give his widow the *net income of the estate* during her life, except the \$400 given to his son, and that those words should be supplied in construing the legacy to her.² As to implied gifts under powers of selection or distribution, see chapter 15, § 2, *infra*, on precatory trusts.

A recital does not necessarily pass an interest.³ But if a testator recites in part of his will that he has conveyed an interest to a certain person, this operates as a conveyance, if no such clause as that to which the testator refers is found in the will.⁴ Yet a mis-recital of a will in a codicil will not operate as a revocation *pro tanto*, unless there is a plain indication of an intention to revoke.⁵

An executor may be appointed by implication. Therefore the assigning executorial duties to one impliedly appoints him executor.⁶ As to implied powers, see chapter fourteen, *infra*, on Limitations to Trustees.

¹ See *Holms v. Williams*, 1 Root, 332; *Eatherly v. Eatherly*, 1 Coldw. (Tenn) 461; *Chappel v. Avery*, 6 Conn. 31.

² *Kellogg v. Mix*, 37 Conn. 243.

³ *Wright v. Wignell*, 2 Vent. 56.

⁴ *Tilly v. Collyer*, 3 Keb. 589.

⁵ *Skerratt v. Oakley*, 7 Durn. & East, 492.

⁶ *Exp. McDonnell* 2 Bradf. 32; *Exp. McCornick*, Id. 169.

CHAPTER XV.

LIMITATIONS TO TRUSTEES.

Devises are executed by the statute of uses. The fact that the statute preceded the statute of wills is an argument in favor of this theory, and not against it, as has been imagined. For, the statute of wills, by authorizing conveyances by will, put them on a level with conveyances by deed. However, the point is practically immaterial, since all admit that testamentary uses are executed by the intent, under the statute of wills, if not under the statute of uses. The statute of uses, indeed, does not "forbid the limitation of a use," as Jarman, strange to say, alleges.¹ For that doctrine was the invention of the courts of law, and not a provision of the statute; but such limitations in wills are, of course, construed by analogy to deeds; or, rather, the statute of wills, if not governed by the statute of uses, at all events, does not enlarge the operation of that act, so as to make it execute a use upon a use in a will. The difficulty suggested in Sugden on Powers,² as to a lapse of the legal estate by the death of the devisee to uses in the testator's lifetime, does not appear to exist; since the courts would hold that there was an intention on the part of the testator of substituting the trustee's heir, in such an event, in place of the trustee, in order to have the use executed.

There certainly does not seem to be the least neces-

¹ Vol. II, 145.

² Vol. I, 6th ed. 173.

sity for devising to the *cestui que use* at once, so far as the doctrine of lapse is concerned; although, if the trustee be an alien or a corporation, and incapable of taking or transmitting a seisin, the question would be different and much more difficult. In such a case, however, the court, which never wants a trustee, would constitute the testator's heir a constructive trustee or grantee to uses.

A devisee to uses will take a legal estate, and not merely a momentary seisin, if the devise be unto his use, as in a deed, or if any active function be imposed on him. But a limitation "unto and to the use" of trustees will not necessarily give them a fee, nor any quantity of estate greater than the necessities of the trusts require. If their duties in respect to the trusts¹ imply that they should have the whole legal fee, this presumption will be a conclusive one, and will not be rebutted by direct limitations to beneficiaries in other parts of the will.² There need not be a direct limitation in the will to the trustees, in order to give them the legal estate. Any indication that A. is to receive the rents, and pay them to B., will give A. the legal estate.³ The questions, therefore, whether trustees take any, and, if any, what quantity of legal interest, is to be determined by the nature and extent of the *active* duties, or of the trusts imposed on them.⁴

If the will be an appointment, the devisee to uses takes the legal estate. For, appointments are mere limitations of uses, and a use on a use is not executed. Therefore, testamentary appointments should be made directly to those intended to take the legal estate.

¹ See *Curtis v. Price*, 12 Ves. 89; 2 Jarm. 214.

² See *Sandford v. Irby*, 3 B. & Ald. 634.

³ *Doe d. Homfray*, 6 Ad. & Ell. 106.

Indeed, as to appointments under special powers, even the devisees in trust must be objects of the power, or they will take no estate whatever. It is not likely, however, that, under special powers, limitations to uses, and not directly, need be often resorted to, except in the case of the minority of the beneficiaries to whom, prior to their attaining age or marrying, an appointment is rarely directed. Trustees under special powers, though not taking any estate, would doubtless be held by the court to take powers of curatorship and tutelage.

Copyholds and interests, such as leases for years and personalty, not within the operation of the statute of uses, should also be devised directly to the persons intended to take the permanent legal interest. If the testator has not himself the legal estate, it does not pass to the trustees, and, if they have no active duty to perform, the *cestuys que trust*, and not they, take the equitable estate. In such a case, trustees take no estate, either at law or in equity,¹ more than when they merely take a momentary seisin to uses under a common law deed or a will.

A devise of land to trustees in trust, to pay the rents and profits to A., gives the legal estate to the trustees according to the intention. It is equivalent to a limitation unto and to the use of the trustees and their heirs in trust, &c. But, if the devise be merely to permit A. to take the rents and profits (not "net" rents and profits), the use is executed in A., and he takes the legal estate.² If the devise be in trust "to pay unto, or permit and suffer A. to receive the rents," A. takes the legal estate. For, of two repugnant limi-

¹ 2 Jarm. 218.

² Doe *v.* Leicester *v.* Biggs, 2 Taunt. 109; Barker *v.* Greenwood, 4 M. & W. 429.

tations, the latter prevails. Jarman suggests that the clause gives the trustees an option. If the trustees are authorized to manage the estate, or pay taxes,¹ or if the purposes of the trust, as if it be for the separate use of a married woman, imply the active intervention of the trustees, they take the legal interest.

Trustees take no estate, legal or equitable, but only a momentary seisin in the following devises: To trustees and their heirs in trust, for A. for life, remainder to B. and his heirs, or in trust to permit A. to receive the rents during his life, remainder in trust to permit B. and his heirs to receive the rents.

If the limitation be to trustees and their heirs, in trust to pay to A. the rents for his life, and after his decease in trust for the heirs of his body, the rule in Shelly's case will not apply, as the trustees take the legal estate only for the life of A. His life estate, therefore, alone is legal, the remainder is equitable; and estates of different quality do not coalesce according to the rule in Shelly's case. The heir is thus in by purchase.²

To trustees and their heirs to pay the rents to A. during his minority, remainder in trust for A. and his heirs. Here the trustees take only a term terminable with A.'s minority. The courts thus incline to executing uses and trusts, and will do so as soon as the purposes of the limitation to trustees are satisfied, whether the trustees are to preserve contingent remainders or not,³ unless the phraseology used shows an intention on the part of the testator that the trustees are to hold the legal estate. Such an intention will be indicated by a

¹ See *Gregory v. Henderson*, 4 Taunt. 772.

² *Watson v. Pearson*, 2 Exch. 581.

³ *Doe v. Hicks*, 77 R. 437; *Doe d. Player v. Nichols*, 1 B. & Cr. 336.

technical limitation unto and to their use,¹ or if purposes here and there in the will render it expedient, that they should retain their fiduciary functions, and therewith the legal estate.² Even if the trustees get an express fee, they only take the legal estate so far as the purposes of the trust require. If these are indefinite, their estate is now held to be equally so. For a fee always passes to them if the purposes of the trust require it. Therefore, although a general devise of land conveys only a life interest to the beneficiary, yet a devise unto and to the use of A., in trust for B. and his heirs, gives A. the legal fee. Where the amount of the rent is stated in the will, or there is a general reference to the annual rents, and a direction to apply them in the payment of certain specified charges, it would seem, on principle, that the trustees take only a term determinable on the payment of the charges, just as a rent-charger in equity, or a tenant by elegit, is held to be only a termor, inasmuch as, by computing his debt with the amount of the annual rents, the duration of his possession can be accurately defined. But this is the meaning of a term of years. It is a certain estate in land, and, not like a freehold, one that is of uncertain duration.

The early cases accordingly, and even some of the later ones,³ give the trustees under such limitations indefinite terms,⁴ if the devise be to them, or to them and their executors, to pay debts and legacies, raise a sum of money, or secure a jointure. If the devise was to them and their heirs, they took, in the earlier cases,

¹ *Doe v. Field*, 2 B. & Ad. 564.

² *Harton v. Harton*, 7 T. R. 652.

³ *Wykham v. Wykham*, 11 East, 458; *Ellis v. Page*, 7 Cush. 164, 165.

⁴ *Cordall's Case*, Cro. El. 315; *Doe d. White v. Simpson*, 5 East, 162; *Ackland v. Lutley*, 9 Ad. & El. 879.

a determinable fee.¹ But the later authorities decide that, as the use of the word heirs will not give trustees the fee, if the trusts, lasting only a certain time, as, for instance, to preserve contingent remainders,² do not require a fee, so, conversely, if the trust to pay debts be spread over an indefinite period, the trustees take the fee and the remainders, or rather the executory interests over, will not be legal estates.³ A devise to trustees, therefore, to pay debts would, in England, even before 1st Vict., c. 26, give them the fee if the trusts were at all scattered, or if convenience would require the trustees to have the legal estate, and even though the personalty were the primary fund for payment of debts. A mere charge of debts, however, has no effect on the quantity of estate taken by the trustees,⁴ and, if the devise is to them on condition, or in case the personalty prove deficient, they take no estate until the contingency happens. But then they take a legal fee.⁵

It is provided in England, by 1 Vict., c. 26, § 30, that in future, trustees under wills are not to take an indefinite term of years by will. But, where the charges are *specified*, perhaps their estate is a *definite* term by implication. This point, indeed, has been decided the other way as regards annuities charged on the land, and not merely on the annual rents.⁶

Yet, in analogy to an estate by statute merchant or

¹ Glover v. Monckton, 3 Bing. 13.

² Doe d. Compere v. Morris, 7 Durn. & East, 433. See Smith v. Dunwoody, 19 Ga. 238.

³ Doe d. Davies v. Davies, 1 Q. B. 430; Poad v. Watson, 6 El. & Bl. 615; Harton v. Harton, 7 Durn. & E. 652. See Hawkins v. Luscombe, 2 Swanst. 391.

⁴ See 22 & 23 Vict. c. 35, § 14, *et seq.*; 1 Vict. c. 26, §§ 30, 31.

⁵ Doe d. Cadogan v. Ewart, 7 Ad. & El. 636.

⁶ Fenwick v. Potts, 8 D. M. G. 506.

elegit, the position seems sound, in point of principle, that trustees for incumbrancers ought to be deemed to take only the estate which the owners of the charges could claim, and that when these could not sell the fee, the trustees likewise should not be deemed to have greater power.

A direction that executors shall pay testator's debts gives them only a power to sell, and not an estate, and does not enlarge any express estate given to the trustees.¹

The estate which trustees take under an ambiguous context may, in England, be much influenced by the enactments referred to.

A devise to trustees and their heirs, on limited trusts, followed by a power of sale or of leasing, gives them the fee.² So does a devise to them in trust to convey the fee.³ But, if they are empowered merely to devise, the implication is not made,⁴ and, if the devise is not to them and their heirs, or generally, but merely for life expressly, this express estate is not enlarged by the addition of a power, unless the general context also implies a fee.⁵

Seemle, conveyances by will are construed much more liberally, and in accordance with the intention of the settlor, than conveyances by way of use, in deeds. For instance, if there is once a limitation in a deed of the fee to trustees and their heirs, to preserve contingent remainders without adding "during the life" of

¹ *Doe d. v. Claridge*, 6 C. B. 641. As to the question whether executors take a power of sale by implication, see Joshua Williams upon Real assets, and the notes to *Silk v. Prime*, 2 White & Tud. Lead. Cas. 82.

² *Watson v. Pearson*, 2 Exch. 581.

³ *Doe d. Shelley v. Edlin*, 4 Ad. & Ell.

⁴ *Doe v. Howland*, 8 Cow. 277.

⁵ *Jackson v. Robins*, 16 Johns. 588.

the particular tenant, the fee remains with the trustees.¹ But, in a will, the addition of the word heirs give trustees to preserve merely an estate *pour autre vie*, unless the trust or purpose of the will requires that they should take a greater estate. Yet, in *Venables v. Morris*,² which was the case of a deed, the arguments and judgment on the construction appear to have been founded mainly on the intention and not on the letter of the limitations. Jarman³ disapproves of the case on the ground that a limitation to trustees and their heirs for certain trusts, including a power to appoint the fee, should not be held to give the trustees the legal fee, merely because the appointment *may* be of a contingent remainder, which would require a legal estate in a trustee to protect it. It certainly does seem strange to construe a legal fee to be in trustees, and thus to render all the ulterior limitations equitable, merely because an appointment *may* be contingent. If the trustees take the legal fee, the appointment, indeed, can be only of an equitable interest, which is indestructible by a particular tenant. But the donee of the power can make it undestructible if he pleases. Jarman's opinion, therefore, on *Verables v. Morris*, appears to be right. The argument for holding the legal fee to be in the trustees does not appear to be so strong where the deed contains a power to appoint in fee, as where the document actually contains a contingent limitation. For, where there is a power to appoint the fee, the power is executory, and the Court will direct under its execution a limitation to trustees to preserve, &c., when necessary. On principle, therefore, the primary trustees should not always, in the same circumstances, necessarily be deemed to have the legal estate, that is, a legal fee for this purpose.

¹ See *Fearne*, p. 56 *et seq.*

² 7 Durn. & E. 342 and 437.

³ VOL II 227

Indeed, the mere fact of a contingent remainder in a will, whether directly limited or to be raised under a power, does not *simpliciter* raise a conclusive or, indeed, any presumption that the testator intended it to be indestructible. If he uses technical language, and yet omits a limitation to trustees to preserve, etc., the inference is that he meant the contingent remainder to take only its natural course.¹ However, in *Houston v. Hughes*,² the circumstance that there was a contingent remainder in the will was considered by the Court an element for holding that the legal estate was in the trustees. Unless technical language is aptly used, it is likely, indeed, that the limitation of a contingent remainder is an element in favor of the position that the trustees take the legal fee. But, if the testator has not the legal estate himself, or if the will comprises only personalty, contingent limitations of which do not need protection, there is, of course, no reason for enlarging the estate of the trustees by reference to contingent limitations of such property.

If other devises or trusts give the trustees an absolute property in the subject matter of such trusts, there is a presumption that they take the fee also of real estate where the context is ambiguous;³ but a devise of land to trustees and their heirs, with power of sale, is not inconsistent with an executory devise of the fee to others after a life estate.⁴

Under a devise of lands in Maine to trustees and their heirs,⁵ to the use of R., the testator's son, for life, remainder to trustees to preserve contingent remainders,

¹ See *Heardson v. Williamson*, 1 Keen, 33.

² 6 Barn. & Cress. 420.

³ *Houston v. Hughes*, 6 Barn. & Cress. 403.

⁴ *Ward v. Amory*, 1 Curt. C. Ct. 419.

⁵ *Webster v. Cooper*, 14 How. 48.

remainder to the sons of R., if any, as tenants in common in tail with cross-remainders, remainder to R.'s daughter, E., for life, remainder to trustees to preserve, &c., remainder to the sons of E. in tail, it was held, 1, that the devise did not vest the legal estate in the trustees; 2, that the estate of R. and the remainders limited thereon were legal estates; 3, that E. did not, under the rule in Shelley's case, take an estate tail; 4, that, upon her death, her two sons took as purchasers each an estate tail in a moiety of the land as tenants in common. This decision shows that the American rules of conveyancing by will to trustees are exactly the same in principle with the analogous English system. Uses, remainders, and limitations by way of purchase, are, in the main, construed in the two nations in the same manner.

Mortgages for years are chattels even at law, and will not pass under a general devise of land, if the gift will be otherwise operative.¹ All interests and charges created out of chattels real are also of the same personal nature.

An equity of redemption subsequently acquired by foreclosure will not pass by a devise of the mortgage,² which will in all cases be construed as conveying only the legal estate, unless, owing to long possession, a release of the equity of redemption will be presumed,³ or there be a local statute, presuming all wills to speak from the date of the testator's death.

A specific devise of land held in mortgage, and *a fortiori*, a general devise of land will not carry the ben-

¹ *Roe & Pye v. Bird*, 3 Black. 1301; *Rose v. Bartlett*, Cro. Car. 293.

² *Ballard v. Carter*, 5 Pick. 112; *Brigham v. Winchester*, 1 Met. 390; 1 Jarm. 654.

³ As to such presumption, see 2 Story, Eq. Jur. § 1520; *Gates v.*

official interest of a mortgage,¹ unless the testator is in possession, or puts the land in settlement.² Yet, it was held in *Mather v. Thomas*,³ that land held in mortgage will pass under a gift of debts and securities for money. As to the expressions creating a trust or beneficial interest, see *Taylor v. Plaine*,⁴

The devisee of an estate which is stated in the will to be under a contract for sale takes only the legal interest.⁵ Yet, if after the devise of an estate which the testator contracted to sell the bargain fails, *Jarman*⁶ thinks the devisee holds beneficially. But this seems to construe a will by an event not referred to in the document. The devisee ought rather, perhaps, be held a trustee for the heir, assuming that, if the contract was executed, the devisee would still be a mere trustee for the next of kin. A testator who recites that he has contracted to sell his estate is a mere trustee, and a devise of the land, subject to any implied trust thereout arising, ought not to have the effect of substituting in any event the devisee for another beneficiary. The only rational ground for *Jarman's* opinion on this point is the unreasonable nature of the decision in *Knollys v. Shepherd*, which did not give the devisee any beneficial interest. But, whatever estate a devisee takes by construction, cannot be lessened by accident or any subsequent event, except ademption.⁷

A direction that all the residue remain in the hands of the executors or under their control, for the use of the testator's wife and children while under age, and that

¹ 1 Jarm. 634.

² *Woodhouse v. Meredith*, 1 Mer. 450.

³ 10 Bing. 44.

⁴ 31 Md. 158; *Freedley's Appeal*, 60 Pa. St. 344.

⁵ *Knollys v. Shepherd*, cited 1 Jac. & Walk. 499.

⁶ Vol. II, 652.

⁷ See *Craig v. Scobie*, 3 Wheat. 563, 577.

after the youngest child shall have arrived at age, the same shall be divided among the children, does not give the executors an estate in trust.¹ But, where the will gave the executors control of the realty, which they were to rent and pay the annual charges, and some annuities, and apply the balance of rents towards payment of certain mortgages, the satisfaction of which was the only limitation on the duration of their trust, it was held that this clause created a trust in the executors, which was void for suspending the power of alienation for more than two lives in being, but that the annuities were separable from the void parts of the will.²

As to the changes made in the law of trusts by the New York revised statutes, see *Lang v. Rofke*.³ By these statutes, all trusts except certain express ones are abolished. Trusts not authorized by these statutes can operate only as powers in trust.⁴ The statute does not apply to trusts of personalty, nor to mortgages,⁵ but it extends to charitable and all other uses, unless they are expressly protected by subsequent statutes. The civil code of Louisiana⁶ prohibits substitutions and *fidei commissa*, or trusts. The person to take must be *in esse* and designated in the will.

By 1 Vict., c. 26, §. 30 and 31., a limitation to trustees is to be deemed to pass the fee, no matter whether the trusts exhaust the whole interest or not. It is still questionable in England, however, whether under an ambiguous will, trustees take any estate or only a power, and, if they take an estate, whether it be for life

¹ *Burke v. Valentine*, 52 Barb. 413.

² *Killam v. Allen*, 52 Barb. 605.

³ 5 Sandf. 363.

⁴ 1 Rev. Stat. 727.

⁵ *King v. Merchant's Exchange Co.* 5 N. Y. (1 Seld.) 547.

“ *par autre vie*, or in fee, and also whether under section 30 they may not still in certain cases take “ a definite term of years, absolute or determinable, or an estate of freehold expressly or by implication.” But they cannot now take in England an undefined term of years, nor perhaps an estate *par autre vie*, with a power by implication, although Jarman¹ is of a different opinion.

Cases under this act will greatly aid the practitioner when construing a State statute of a similar nature. The English decisions, however, under the sections stated do not appear to be very numerous.

Questions relating to the estate taken by trustees or beneficiaries are all important in England, where a puisne incumbrancer can obtain priority over all preceeding mortgagees, chargeants, and encumbrancers, by taking an assignment of the legal estate, even with notice of the prior charges, provided he had not such notice when he first became a chargeant himself. This doctrine of tacking is founded on the equitable maxim that when the equities are equal the law will prevail. But this doctrine does not apply to States having general registries. For, registration is notice to all the world, and, therefore, in such countries possession of the legal estate is valueless as regards title. The legal estate is only of use when an ejectment or other proceedings at law are to be taken against a tenant who has not attorned to the plaintiff. If of two registered incumbrancers one has the legal estate, he alone at law is entitled to the possession. Yet, even if he has a beneficial charge or interest, which his legal interest was intended to support, he may be restrained by equity from recovering the possession at law. And where the trusts of a legal estate are satisfied, a registered instru-

¹ Vol. II. 230.

ment whether will or deed, conferring such legal estate is valueless, as the trustee will be restrained in equity from impeding the owner of a subsequent beneficial interest from recovering possession of the property. If the legal estate be long outstanding, it will be presumed to be assigned or released to the equitable owner, who can obtain at any time a decree for its surrender, if the trustee or his heir refuses to do so.¹

Meantime, a trustee will not be permitted to abuse his discretion,² and if he refuse to execute an existing trust, the court can appoint another to execute it.³ But if he acts *bona fide* in a trust wholly confided to his discretion, the court will not interfere.⁴ It is probable that, at the present day, any great degree of imprudence or negligence on the part of the trustee would be deemed by the court constructive evidence of *mala fides*, and would be checked accordingly.

An illegal secret trust may be proved by parol, and defeats the express gift.⁵ But an illegal trust, in an unattested paper or other illegal codicil, will not affect a gift in a prior will duly executed and fairly obtained.⁶ The illegality must be part of the *res gestæ*, and not subsequent thereto. Yet, of course, the subsequent conduct of the parties⁷ or the subsequent declaration of the testator is evidence of the illegality if it relates to such, and shows that it existed at the time of the

¹ See Story Eq. Jur. 998-1002, and notes; Sugd. Conc. View, 477.

² Prewett v. Land, 36 Miss. 495.

³ 20 Texas, 69.

⁴ Hawes Place Society v. Hawes Fund, 5 Cush. 454; Sharon v. Simons, 30 Vt. 458; but see Heard v. Sill, 26 Ga. 302.

⁵ See Sweeting v. Sweeting, 12 W. R. 239.

⁶ See Addlington v. Cann, 3 Atk. 152.

⁷ Trimmer v. Bayne, 7 Ves. 508, 518; Hester v. Hester, 4 Dev. 228; *contra*, Provis v. Rowe, 5 Bing. 435; see *supra*, Part I, notes to Proposition Seven, p. 250.

will. In other words, such subsequent declarations are admissions, and are, as such, evidence of the *res gestæ* in a question of fraud or other illegality.

The legal estate of a mortgagee or trustee will pass by a general devise of land,¹ even though the testator has other property to satisfy the gift, and though the devisee gets a power of appointment.² But mortgage or trust land will not pass by a general devise if it is subjected to the payment of debts, legacies, annuities or other charges, or is put in settlement, or subjected to executory limitations or a trust for sale.³ Yet it seems strange why the rule of rendering to each term only its own respective force—*reddendo singula singulis*—should not be applied in such cases, and the mortgage or trust estate be held to pass.⁴ The word “mortgage,” doubtless, ought to be held to pass both the legal and equitable interest in the mortgage land. But the phrase “securities for money” does not seem applicable to a legal estate in land.

Though a general devise of land will not, in England, carry the beneficial interest in a mortgage,⁵ (nor, *semble*, will a devise of the particular lands held in mortgage have this effect), yet, Jarman⁶ thinks that if the testator is in possession of the land, this is evidence that he intended the beneficial interest to pass. But it is doubtful whether parol evidence is admissible in such cases, as the ambiguity relates to the words of disposition.

Jarman thinks⁷ that if there is a bequest of all mortgages or securities, this does not affect the right of a devisee of a particular mortgage to the beneficial interest

¹ 4 Kent, 5th Ed. 538.

² *Ex parte Shaw*, 8 Sim. 159.

³ 2 Jarm. 645.

⁴ See *Jackson v. Delancy*, 13 Johns. 537.

⁵ See *Cogdell v. Cogdell*, 3 Desaus. 346.

⁶ 2 Jarm. 634; see, *supra*, 182–3.

⁷ Vol. II. 636.

therein, as the general bequest may contemplate future mortgages, but that if there was a specific bequest of the mortgage debt this presumption will not apply.

Where executors are to pay rents and profits to a devisee of the land, the executors take the legal estate by implication.¹ However, a legacy not residuary to an executor is conditional on his acting in the office;² and a debtor, too, when appointed executor, is still a trustee of his debt as assets for legatees, and even for next of kin.³ As to substituted executors, see *Smiley v. Bailey*⁴ and *Foster's case*.⁵

¹ *Vail v. Vail*, 4 Paige, 317; compare *Sterrick v. Dickinson*, 9 Barb 516.

² *Reed v. Devaynes*, 2 Cox. 285.

³ *Carey v. Goodinge*, 3 Br. C. C. 110.

⁴ 49 Barb. Sup. Ct. 80.

⁵ *English Law Rep.*, 1872, C. L. 304.

CHAPTER XVI.

SURVIVORSHIP.¹

§ 1. *Rule in Ferguson v. Dunbar.*

If the phrase “dying without issue” has defeated many testamentary limitations and made the fortunes of many practitioners, subsequent clauses in the same will respecting a survivorship among the issue have had tenfold greater effect in the same direction. The word “survivor” is the most difficult of construction among all the terms which either legal acumen or lay eloquence can suggest. In addition to the express contingencies or conditions which are to determine what is a survivor within the definition referred to in the will, there is also superadded the additional danger of lapse, and the implied reference to the contingency of each of the intended survivors of a class also surviving the testator.

The questions respecting the meaning of the term “survivor” which have most puzzled the courts—and those difficulties are not yet finally settled by adjudication—may be divided into three leading classes.

The first point to be determined respecting the term is, whether it is itself to be construed literally or in the sense of “other.” An example will best illustrate the nature of this difficulty. In *Ferguson v. Dunbar*,² a testator bequeathed a legacy to his wife, remainder to her three children, one-half to her son G., and one to her daughters E. and C., if living at the death of their mother, and if any of them should die in the life-time

¹ Part of this chapter was published by the author in *Alb. Law Journal*, vol. V. p. 130.

² 3 B. C. C. 468, note.

of their mother, leaving issue, the testator gave that share to the issue of such child or children equally, at the age of twenty-one years, or day of marriage; but if any of them should die before the age of twenty-one years, without issue, he gave that share to the survivors, and, if all of them should die without issue, the share was to fall into the residue. C. died, leaving children; E. afterwards died under twenty-one, and without issue. The question was, whether the children of C. were entitled to any part of the share of E. It was held that they were not. Lord Thurlow admitted that the testator intended that the children should take the shares which would have accrued to their parents while living, but as he had not said so in his will, but limited such shares to the survivors or survivor, the court should declare that G., as the only surviving child, was entitled to the whole of E.'s share.

This decision was followed by *Wilson v. Audrey*,¹ and especially by *Crowder v. Stone*,² which divided for a long time with *Ferguson v. Dunbar* the honor of being known as the leading cases on the doctrine now under consideration. In *Crowder v. Stone*, a testator bequeathed certain stocks to tenants for life, and, after their decease, to be equally divided between his nephew and four nieces, and in case of the death of his said nephew, or of any of his said nieces without lawful issue, before their respective parts should become payable, then the part of him or her so dying without issue, as aforesaid, was to go to the survivors or survivor, as tenants in common. At the decease of the last of the tenants for life, one niece only survived, but some of the deceased nieces left issue. Yet, Lord Lyndhurst decreed the whole fund to the survivor.

¹ 5 Ves. 565.

² 3 Russ. 217.

The case of *Crowder v. Stone* is not in principle in the least more strong or extreme than the case of *Ferguson v. Dunbar*. The former case only shows the extreme inconvenience and absurdity that may result from adopting the rule in *Ferguson v. Dunbar* invariably, and applying to wills in this special instance the same rules that prohibit the implication of cross remainders in deeds. The cases we are now considering are the more to be abhorred, inasmuch as cross remainders under other limitations are freely allowed in wills.

A bounty is held out for the loose drawing of wills, as these are supposed to be liberally construed by the courts; and yet the judges now and then halt at some magical phrase, such as "survivor," "heirs of the body," "issue," and refuse to take away one jot or tittle of the old law applicable to deeds.

Even a slight change in any rule of construction is certainly very dangerous to be adopted unless all the consequences of the innovation are carefully considered beforehand. For, what seems to be an innocent reform may work very great changes under new limitations. Yet an occasional alteration in a rule of testamentary construction is not as inconvenient as a change in a rule applicable to deeds, because certainty in the law does not and cannot insure good testamentary draughtmanship, which has largely been, from time immemorial, a perquisite of the village schoolmaster. Indeed, certainty in the law and rules of construction eliminates judicial discretion, and this is not one of the least valuable results of a certain jurisprudence. But adherence to fixed rule, as regards testamentary construction, ought to be restricted to received interpretations of common phrases, and not to a perpetuation of the technical meaning of technical terms such as "survivor," "heirs of the body," &c.

The rule in *Ferguson v. Dunbar* has lately been much shaken in England, and though it appears to be still unbroken in the United States,¹ yet it is evidently doomed. In *Cole v. Sewell*,² the doctrine in *Crowder v. Stone* was attacked by Lord St. Leonards; and that case, with its special surroundings, has fallen recently beneath the judicial axe in *Marriott v. Abel*.³ At present, if there is any collateral condition or contingency affecting the gift to the survivors, except the implied condition of their survivorship, the rule in *Ferguson v. Dunbar* will not apply. If, for instance, the testator expressly refers not merely to one of the legatees dying in the lifetime of the other, but of one of them *dying childless*, or without issue, in the sense of children, the word "survivor" will be construed "other," and children such as those excluded in *Ferguson v. Dunbar* and *Crowder v. Stone* will take.

Jarman, however,⁴ thinks "the authorities seem now to present an insuperable obstacle to the adoption of any change in the rule where the context is silent as to other contingencies than that of survivorship alone." But, the recent case of *Marriott v. Abel* shows that Jarman's apprehensions were not well founded. As the old rule is thus so completely wrecked in England, there is an *a fortiori* ground for expecting that it will not in future be applied in the United States, especially when the context affords any aid to a liberal construction of the term "survivor."

It is hard to see how the doctrine in *Crowder v. Stone* can be maintained without endangering all the established rules for implying cross-remainders and

¹ See 2 Redfield on Wills, p. 371, *et seq.*

² 2 Con. and Laws, 344, Irish.

³ L. Rep. 7 Eq. 478.

⁴ Vol. II. 617.

other interests in wills. From the observations of Lord St. Leonard, in *Cole v. Sewell*,¹ and the case of *Slade v. Parr*,² the old rules certainly appear to rest at present on a slender and timeworn foundation.

In the American States, indeed, hitherto the term survivor, when unaffected by the context, has received its proper acceptation only, and has not been interpreted "other."³ Yet, even in a deed, cross-remainders in tail to surviving children have been held, even in England, to give an interest to the issue of a deceased child, as the estate was not to go over, unless the issue of all the children failed.⁴

However, if the bequest be to A. for life, and after his decease to B., C. & D., or the survivors, those living at the death of A. alone will take.⁵

Even if the word survivor is used elsewhere in the will as synonymous with "other," yet the rule in *Ferguson v. Dunbar* may still prevail.⁶ Survivor, too, will be construed other, more readily where the limitation over is on the decease of any of the prior objects, combined with some collateral event, especially if this relates to the issue.⁷ The alleged reason of the distinction is that the limitation over is not wholly interwoven with the point of survivorship. But, if the contingency is confined to the donees themselves, such as their not leaving issue, and not as in *Aiton v. Brooks*, relating to the issue, the rule in *Ferguson v. Dunbar*, and *Leeming v. Sherrat*,⁸ will apply.

¹ 2 Conn. & Laws, 344.

² 7 Jur. 102.

³ *Moore v. Lyons*, 25 Wend. 119; see *Fowler v. Depau*, 26 Barb. 224; *Norris v. Beyea*, 13 N. Y. (3 Kern.) 273.

⁴ *Doe v. Wainwright*, 5 Durn. & East, 427.

⁵ *Hearn v. Baker*, 2 K. & J. 383; see *Doe v. Townsend*, 1 Houst. 365.

⁶ See *Leeming v. Sherrat*, 2 Hare, 14.

⁷ *Aiton v. Brooks*, 7 Sim. 204.

⁸ 2 Hare, 14.

But, as the ruling in the cases mentioned pre-eminently defeats the intention of testators, the courts will be astute in discovering in the context some loophole for escape. The contingencies on which the limitation to the survivors depends, are however, usually the only pivots whereon the beneficent intentions of the Judges can turn.¹ For instances, where the term "survivor" may be construed other, see *Cole v. Sewell*.²

The distinction taken in *Aiton v. Brooks*, between the event of one of the donees dying in the life-time of the other, and that of dying childless contains, as Jarman observes, much good sense.³ This distinction, indeed, is one which is present to the mind of every testator who dictates any similar limitation, only that he may not express his intention with sufficient point to meet the very technical rule of construction established by *Ferguson v. Dunbar*.⁴

Where the word survivors is used merely with reference to a class, to denote the duration of an estate, and does not intrinsically impose a fresh condition of survivorship, those who die before the end of the term may have vested and transmissible interests.⁵

The incident of survivorship is abolished by the Act of 31 March, 1862, in Pennsylvania, in cases where there is a devise to two or more by name, unless the testator shows a plain intention to vest the estate in the survivor.⁶

¹ See *Leeming v. Sherratt*, 2 Hare, 14.

² 2 H. L. C. 186; *Smith v. Osborne*, 6 H. L. C. 375.

³ 2 Jarman, 617.

⁴ 3 Br. C. C. 468.

⁵ *Bryan v. Twigg*, Law Rep. 3 Ch. App. 183.

⁶ *Kennedy's App.* 60 Pa. St. 311.

§ 2. *Survivorship—Accrued interests.*

If a testator gives a sum of money to four as tenants in common, and declares that if any die under twenty-one or before marriage it shall survive to the others, if one dies, his share survives to the other three, but if a second dies, the other two will take only the second's original share, and not the one he got by accruer on the death of the first.¹ Let the sum be \$1,200, and the parties be designated as A., B., C. and D. Each takes \$300. On A.'s death, B., C. and D. get each \$100. But, on B.'s death, C. and D. get only \$150 each, and not \$200, though A. gains altogether \$400 under the will. A concrete example always best explains an abstract rule. The doctrine in question is known as the rule that a gift to survivors in a class does not carry shares accrued already to the members as survivors, but only their original shares; in other words, a limitation to survivors does not operate on shares already accrued to members of the class of donees under the gift to which the survivorship of the donees relates. This doctrine is founded on the general disinclination of the courts to divest estates. If some of the donees die in the testator's lifetime, Mr. Hawkins² considers that their shares will go to the survivors. This will probably be the case if the donees constitute a class, though the shares are in common, and not joint.³

The doctrine in *ex parte* West would, perhaps, not be adopted in America in similar cases.⁴ There is, indeed, no doubt that a testator intends by a gift over

¹ See *Lawrence v. McArter*, 10 Ohio, 37; *ex parte* West, 1 Bro. C. C. 575; *Pain v. Benson*, 3 Atk. 80; *Crowder v. Stone*, 3 Russ. 217; but see *Marriott v. Abell*, L. R. 7 Eq. 478.

² P. 269.

³ *Barker v. Giles*, 3 Bro. P. C. Toml. 104.

⁴ See 2 Redfield, 373, note 3.

to survivors to pass accrued as well as original shares of the donees who die previously.

Yet in England even the word "share," "portion" or "part" will not carry the accrued interest. It will be suffered to lapse rather than to pass under the terms¹ mentioned. The phrase "share and interest," however, may have this effect.² But, of course, if the testator pleases, he can make the accrued shares devolve on the ultimate survivor, either by express direction or by using phraseology that will necessarily raise that implication. If his intention, as declared in the will, be that the entire property shall pass in one mass to the ultimate survivors, this will imply a survivorship as to the accrued shares,³ especially if there is a gift over.⁴ Jarman thinks⁵ that, under a gift over, in case all the legatees die without issue, "all" would not be construed "any."⁶ But, as "survivor" is sometimes construed "other," so, *pari ratione*, "all" may be construed "any" in the cases referred to.

The phrases "benefit of survivorship," "in the manner aforesaid," directed regarding the original shares, will pass the accrued shares. For a curious illustration of the effect of the rule in *ex parte* West, see *Eyre v. Marsden*.⁷ It seems only to apply to limitations to survivors, and not to alternative limitations to the children of the donees.

If direct or original shares are given for life, and accrued shares indefinitely, these will not be cut down in meaning by analogy to the primary interests, although

¹ *Rickett v. Gillermaid*, 6 Jur. 818.

² *Douglas v. Andrews*, 14 B. 347.

³ 2 Jarm. 622.

⁴ *Doe v. Berkhead*, 4 Exch. 110.

⁵ Vol. II, 626, 4th Am. Ed.

⁶ See, *contra*, *Douglas v. Andrews*, *ut sup*; *Worlidge v. Churchill*, 3 Bro. C. C. 465.

such is probably the intention of the testator. The cases cited by Jarman,¹ however, rather prove the contrary of his position. But, where there are various restrictions on the primary shares, and not merely a limitation of interest, as for a life, and the restrictions are not repeated on an express gift by the testator of the accruing shares, it seems to be settled that the restrictions will not be extended to such shares by implication: nor, *semble*, if the original shares vary in amount, will the accruing ones be distributed in the same proportion, unless otherwise the accrued shares would be void for remoteness, or would, in some way, be inconsistent with the testator's primary intentions.²

§ 3. *Period for ascertaining survivorship.*

A third question, connected with a limitation to survivors of a class, or several donees, relates to the period when the survivorship is to be determined, or to the inquiry whether the reference is indefinite in point of time. Under a tenancy in common, with an express limitation to the survivors, none of the tenants in common can defeat the gift to the survivors. Under a joint tenancy, the legal right of accruer is of no value, inasmuch as any of the joint tenants may still alien his share, and defeat the right of accruer.

If the donees take an interest vested in possession on the testator's decease, the survivorship clause is deemed to have been inserted to provide against the death of any of the donees in the testator's lifetime, and to refer to the date of the testator's decease.³ But, where there

¹ Vol. II, 624.

² *Georges v. Georges*, Hayes' Inquiry, 52; *Gibbons v. Langdon*, 6 Sim. 260.

³ See *Passmore's Appeal*, 23 Penn. St. 381.

is a preceding life interest, the question is more difficult. Owing to an impression that indefinite survivorship was inconsistent with a tenancy in common, the death of the testator was the period to which the early adjudications on the point referred the survivorship.¹

Under a gift to A. for life, and in case B. die without issue, remainder to two or more, and the survivors or survivor, as tenants in common, the survivorship may be construed in four different ways. It may mean that the donees who survive the testator should take vested interests, or that those only who survived both the tenant for life and the testator should take, or that they should survive both these periods, and also that of the contingency referred to; or the clause of survivorship may be construed as indefinite, and giving the whole interest to the final survivor. A gift over on the decease of the survivor will impart this last meaning. With the exception of limitations of the last description, there is little ground for doubting that the period of the testator's death, and not that of the tenant for life, is the natural date for a vesting in possession of a gift to survivors, and that when an express contingency or condition is also limited, those who survive the contingency and the testator ought to be deemed to take. Jarman opposes this view with his usual learning and affiliation of cases. But these are hardly, perhaps, as strong as he deems them, while they do not apply to devises of land. Such gifts are, in the main, construed as vesting at the testator's death.

When the gift was to the donees as tenant in common, the judges considered that the clause of survivorship was to prevent lapse, and, therefore, necessarily pointed to the date of the testator's death, and not to

¹ See *Moore v. Towns*, 25 Wend 119

that of the tenant for life. The difference between the two renderings is that survivors taking at the death of the testator, and dying during the life of the particular tenant, transmit their shares to their heirs or next of kin according to the nature of the property, but if the survivorship relates to the death of the tenant for life, those donees only who are then living take vested and transmissible interests. Exceptions to the early rule on this point, as far as regards bequests of personalty, were soon founded on the fact that the testator referred to the donees by name, or to the survivor (in the singular), or, that the interest was of a deferred nature. Finally, it has become firmly settled in England, that, as regards bequests of personalty, the period of survivorship is that of distribution and relates to the death of the tenant for life.¹

The old rule, however, though cavilled at, still remains unbroken as regards devises of realty.² Jarman³ greatly bemoans this divergence from the rule that regulates similar dispositions of personalty.⁴ But with all respect to that very learned commentator, the intention of a testator appears to be better effectuated by giving a little to many, rather than a large deferred and contingent interest to a few. "To him that hath shall be given," is not by any means a motto likely to be present to the mind of a testator when about distributing his means amongst his family.

Some writers now think that the change of the law, as indicated by the cases on personalty, renders it uncertain whether the rule as to bequests may not in

¹ *Cripps v. Woolcott*, 4 Madd. 11; see *Den. v. Sayre*, 2 Penn. 598; *Blewitt v. Stanffers*, 9 L. J. N. S. Ch. 209.

² *Edwards v. Symonds*, 6 Taunt. 213.

³ 2 Jarm., 463; see *Haddelsley v. Adams*, 22 B. 271.

⁴ See *Buckle v. Fawcett*, 4 Hare, 536.

future be extended to devises. But these appear to be protected from such a calamity by the general rules which favor the early vesting of estates.¹ Mr. Hawkins considers² that the "true rule, perhaps, is, that survivorship's *prima facie* refers to the point of time mentioned in the gift in nearest juxtaposition with the words." If no other clue to the intention of the testator is available, no doubt the suggestion of Mr. Hawkins ought to be acted on. But in a will grammatical construction is rarely important, owing to the special wording of ill-drawn instruments under which alone questions of difficulty can now arise, testamentary law being in the main so well settled by cases.³

With respect to this point, substitutional bequests are to be distinguished from cases such as *Barker v. Giles*,⁴ where, under a devise to A. & B., and the survivors of them, their heirs and assigns as tenants in common, A. & B. were held to be joint tenants for life with several remainders in fee. The words of severance here are not necessarily applied to the estates for life. Therefore, the usual legal presumption in favor of a joint tenancy so far prevails. Besides, the words of division and severance are thus sought to be reconciled with a gift to the survivor. Yet, this construction may occasion a lapse of a moiety of the inheritance which would otherwise vest in A. or B. surviving the testator. The doctrine in *Barker v. Giles*, seems equally applicable in principle to similar bequests of personalty, and would probably be followed in the American courts.

If the gift to survivors is to take place on a contingency, as if any of the donees, or if another, or if the ten-

¹ Jarm. Vol. II, 750.

² P. 266.

³ See *Littlejohn v. Household*, 21 B. 29.

⁴ 3 Bro. P. C. Toml. 104; see *Doe d. Littlewood v. Green*, 4 M. & W. 229.

ant for life die without issue, Jarman considers¹ this strengthens the argument for a reference to the time of the death of the tenant for life, inasmuch as a contingent limitation to survivors is clearly consistent with a tenancy in common. But the argument in favor of computing survivors at the time of the testator's death is not wholly founded upon the incidents of a tenancy in common as distinguished from a joint-tenancy, but upon the leaning of the courts to deem interests vested, especially as regards real estate.

In *Carver v. Burgess*,² the bequest to the survivors was on a contingency, and it was held that the period of distribution related to the happening of the contingency; but there was no preceding life estate. The case is thus only in conformity with the general rule, which makes the vesting of a legacy to survivors depend on the period of distribution.³ In accordance with this rule, under a bequest to A. for life, and after his death to his surviving children, if A. dies in the lifetime of the testator, the date not of A.'s, but of the testator's death is the time for computing the survivorship, as that is the period of distribution.

The question, however, even in such cases, does not necessarily appear to be whether the survivorship is indefinite, or relates to the death of the tenant for life. For, though the contingency shows that the testator did not mean merely to guard against a lapse, yet, on the other hand, it does not imply that he did not also intend to guard against that contingency, and yet not to expose the gift to a special risk. Certainly, if it is open to one danger, there is only the more reason for presum-

¹ 2 Jarm. 650; *Huffan v. Hubbard*, 16 B., 579; *Daniell v. Daniell*, 6 Ves. 297.

² 7 D. M. G. 96.

³ *Cripps v. Woolcott*, 4 Madd. 15.

ing that the testator did not mean to render it liable to others. The argument founded on the contingency appears not to be of much value either way.¹

In *Roe d. Sheers v. Jeffrey*,² indeed, it appears to have been conceded that where one of the donees survived the testator, and only died after the contingency happened, but during the life of the particular tenant, he did not take under the limitation to survivors. But neither this case, nor the opposite one of *Doe d. Lifford v. Sparrow*,³ is any real authority on the point, as these cases were decided upon special grounds. The next case cited by Jarman—that of *Weeden v. Fell*⁴—is distinctly against his view. That case was one of personalty, while the other two decisions just referred to were cases of devises. *Weeden v. Fell* is, therefore, an *a fortiori* authority as regards similar limitations of realty.

The case of *Weeden v. Fell*⁵ indicates that where there is a special contingency or condition imposed, survivorship will, as a rule, refer to the period of the contingency. Does not this exclusion of regard for the decease of the tenant for life show that the date of the testator's death is the natural period for computing survivorship, when no contingency is in question?

If several contingencies or conditions are imposed, some of which are not personal to the legatees, these latter conditions will not prevent a vesting, although they may operate to divest the interest afterwards.⁶ Mr. Hawkins justly observes that contingent provisions for children may not, owing to the general ten-

¹ See *White v. Baker*, 2 De G. F. & J. 55.

² 7 D. & E. 589.

³ 13 East, 359.

⁴ 2 Atk. 123; *Dickenson v. Jordan*, 1 Murph. 388.

⁵ 2 Atk. 123.

⁶ *Crozier v. Fisher*, 4 Russ. 398.

dencies of the courts, be construed to be subject to the additional contingency of the children surviving the testator.¹ This reason is sound, and applies, though in a less forcible form, to all similar limitations.

If there is a limitation over after the death of the survivor, this points, of course, to an indefinite survivorship.²

The word "survivor" has thus produced a very abundant crop of litigation. The net results of the cases appear to be, first, that the term will be construed literally, and not as other, and that any of the donees not surviving the appointed period takes, as survivor, no vested and transmissible interest; secondly, a limitation to survivors does not carry shares previously accrued under the operation of the same clause; thirdly, a gift to the survivors, *simpliciter*, of a number of tenants in common, refers to the donees surviving the testator. But, where there is a precedent life interest, and the subject is personalty, the "survivors" take no vested interest or are not ascertained until the period of distribution, that is to say, at the time of the decease of the tenant for life.

The limitations considered in this chapter are probably not of frequent occurrence in American wills. But, as our settlements of property become more complicated, there is no doubt that testators will likewise be equally provident in respect to remote contingencies. Even at present the doctrines relating to survivorship have been illustrated by some American decisions. However, although, doubtless, the value of the English rules will be taken into account in future adjudications upon these questions, yet there is equally

¹ *Berry v. Briant*, 2 Dr. & Sm. 1.

² *Doe d. Borwell v. Abey*, 1 M. & Selw. 428.

strong ground for considering that the technical rules established in *Ferguson v. Dunbar*,¹ *ex parte West*,² and *Brograve v. Winder*³ (although the latter decision is highly approved by Jarman), would, if at all followed here, be, at all events, confined within the strictest possible bounds. It has, indeed, been already frequently decided in the American courts, that survivors may mean others, and not actual survivors,⁴ even though the survivors do not take the accrued share which a deceased member of the class took by lapse, but only the original shares of the bequest.⁵ See further as to the construction of the term "survivor" in the New York courts, *Cushney v. Henry*.⁶

§ 4. *Limitations dependent upon decease.*

If the testator does not leave the period of survivorship uncertain, as in the cases last considered, but limits the interest over in the event of the donee, or one of the donees, dying before a certain contingency happens, and if a donee subject to such contingency dies in the lifetime of the testator, there is no lapse, but the gift over in the first case, or to the other members of the class in the second, will operate. Thus, for instance, where there is a gift to A., but if he die under age to B., and A. dies in the lifetime of the testator, the remainder to B. takes effect as a simple

¹ 3 B. C. C. 468 n.

² 1 B. C. C. 575.

³ 2 Ves. Jun. 634.

⁴ *Carter v. Bloodgood*, 3 Sandf. Ch. 293.

⁵ *Norris v. Beyea*, 13 N. Y. (3 Kern.) 273; see *Fowler v. Depau*, 26 Barb. 224; *Pirnie v. Purdy*, 10 Barb. 60.

⁶ 4 Paige, 345; *Dominick v. Moore*, 2 Bradf. 201; *Goodall v. McLean*, 2 Bradf. 306; *Clark v. Clark*, 3 Bradf. 32.

absolute gift on the testator's decease.¹ There is no lapse. Even where the gift is to a class, such as children who cannot be ascertained until the death of the testator, yet if one dies before that period, although he never was an actual donee, his share will go to the surviving children.

But, where the donees in the clause in question are the executors of the deceased legatee, the word "executors" merely indicates that the interest is vested on the testator's decease, and prior to the period of distribution, and the executors will not be deemed to take by substitute in case of lapse. The ground of this somewhat strange doctrine appears to be the presumption that a testator believes the objects of his bounty will survive him.² This is a most violent presumption, where he almost expressly provides for the contingency of lapse.

A bequest to the next of kin of a married woman, in case she die, her husband living, is held to apply only to the contingency specified, and not to a lapse.³ This is a comparatively reasonable rule. *Expressio unius, &c.* As regards the issue of a deceased child, however, the courts will strain at any expression that may admit such issue to a participation in a general family settlement.

¹ Darrel v. Molesworth, 2 Vern. 378.

² Corbyn v. French, 4 Ves. 418; see Fisher v. Hill, 7 Mass. 86; Princes Dig. 256; Nelson v. Moore, 1 Ired. Eq. 31.

³ Baker v. Hanbury, 3 Russ. 340.

CHAPTER XVII.

§ 1. *Nature and incidents of powers.* .

Powers are either appendant, collateral, or simply collateral, according as the donee of the power—or, as he is sometimes termed, the appointor—has an interest; 1, in the particular property to be appointed; or, 2, in another part of the same property; or, 3, has no interest of any kind in it. Powers of the first kind are suspended by any grant or change by the donee on his interest. For, it would be inequitable to allow a person under a power to defeat his own grant. If, therefore, he assigns away his whole interest, his power is completely extinguished, and, if he makes a partial disposition of it, his power is so far suspended; or, rather, he may still execute his power at once, but the appointments so made by him will be puisne in order of priority to his own grants or changes, so far as his interest extends. So far as his interest does not extend, the appointment will operate from the date of the primary deed conferring the power, and not from the date of the deed executing it.¹ A power may thus be appendant as regards one limitation and collateral as regards another limitation in the same settlement.²

The peculiar value of a power, therefore, is that it operates from the date of the primary deed. It also overrides all other limitations in that deed, unless so far as the power is appendant, and has been indirectly sus-

¹ *Noel v. Lord Henley*; 1 McClell. & Y. 52.

² See Sugden on Powers, p. 3, *et seq.*

pended by some grant or change by the donee on his own interest in the subject matter of the power. Powers appendant may be thus impliedly suspended. They may also be suspended expressly by a covenant to that effect. Powers collateral are, in their nature, incapable of indirect suspension, but may be suspended or extinguished by express contract. Powers simply collateral are considered to be incapable of suspension even by express contract.¹

In the absence of satisfactory judicial decisions on these points, it would seem that neither of the two latter classes of powers can be suspended, much less extinguished, if they are trust powers, but that, on the other hand, if they are merely discretionary, there is some reason to contend that they may be voluntarily extinguished by the donee. Yet, it seems inequitable to allow even a donee of a bare discretionary power to abdicate his functions. He is a trustee of his discretion. These remarks are suggested with great diffidence on points which have been elucidated to some extent otherwise by so distinguished a judge and author as Lord St. Leonards. However, the courts will not interfere with a *bona fide* exercise of discretion by the donee of a power, even when it is a trust power.² As to discretionary powers, see, further, *Forman v. Whitney*.³

A general power is never a trust power. A special power may or may not be in trust. Both kinds of powers may be contained in wills, and, *semble*, in any kind of deed also, although Lord St. Leonards considers that special powers cannot be reserved in deeds operating by way of use and not at common law.⁴

¹ 1 Sugden on Powers, c. 1, 2.

² *Portsmouth v. Shackford*, 46 N. H. (Hadley) 423.

³ 2 Keyes, 165; *Bundy v. Bundy*, 38 N. Y. 410.

⁴ See this question discussed by the author in a review of Sugden on Powers, in *Law Mag. and Review*, London, May, 1862.

In *Learned v. Tallmadge*,¹ a devisee of a power executed it, notwithstanding that he had previously covenanted by deed not to do so. The covenant was held to be inoperative, as the power was deemed to be simply collateral. But, as the husband took a contingent estate, besides the power, this was not a power simply collateral. The decision, however, can be supported on principle, inasmuch as the power was a trust.

The order of priority of various powers comprised in the same instrument will be determined by the justice and reason of the matter, and the probable necessity for executing them at an early or late date, according to their nature. Therefore, a power to jointure overrides a power to portion, because a wife's claims are prior to those of children, who may never require portions. Powers of leasing appear to be still more urgent, inasmuch as they relate to the management of the estate, without proper attention to which there might be no adequate property to appoint at all. On these points, see the distinguished work already cited, and also the very copious treatise of Mr. Chance.

A general devise will not operate as an execution of a power if the gift may be otherwise operative,² unless where a local statute provides to the contrary. Where a married woman makes a will of realty, which would be void except as an appointment, it will be construed as such.³ So, a devise of lands in A. and B. will operate as an execution of a power over lands in B., though testator has lands in A.,⁴ if he have none in B.

A general bequest of personalty does not operate as an execution of a power, because, as it takes effect in

¹ 26 Barb. 443.

² *Blagge v. Miles*, 1 Story C. C. 426, 445.

³ *Berger v. Berger*, 1 Hoff. 2.

⁴ *Napier v. Napier*, 1 Sim. 28.

every State only from the death of the testator, he may have personal property then to satisfy the gift.¹ And this rule applies to wills of married women, inasmuch as they may have separate estate.

All powers conferred on the testator after the date of the will are now executed by a general devise in all those States where devises speak from the death of the testator, if the powers would under the old law have been executed if they had existed at the date of the will, and if they are not mere powers of revocation contained in deeds executing powers.²

In *Wilson v. Bell*³ a testator bequeathed all his personalty to his son T., and devised his real estate to T. for life, with remainder over, and appointed T. his executor. The will contained the following clause: "And I direct that my said daughter A. B. shall reside with and be maintained by my said son so long as she shall remain single and unmarried." The English Court of Appeal in Chancery held (reversing the decision of Vice Chancellor James), that A. B. had no claim on the executors of T., but that the trust was imperative, if A. B. was willing to reside with T. during his life; in other words, that the maintenance of A. B. was conditioned upon her willingness to reside with T., and that this trust on T. ended with his life.

A power to the executors to sell real and personal property does not pass to them any estate, or break the descent, and the land (if any), passes at once to the devisees, or else to the testator's heir, subject only to the

¹ *Andrews v. Emmot*, 2 B. C. C. 297.

² *Palmer v. Newell*, 20 Beav. 38.

³ Law Rep. 4. Ct. App. 581; 17 W. R. 944.

execution of the power.¹ But a devise of land to executors to sell gives them the fee.²

A devise to sell, being a mere power, does not break the descent, even where the donee of the power is residuary devisee.³ So, where the executors were appointed trustees of minor beneficiaries, and authorized to sell, it was held that they took only a power.⁴ Giving legacies, and directing the executors to appraise the real estate and increase or diminish the legacies, according to the surplus after paying debts, has also been held not to amount to a devise of the real estate.⁵

Where executors are directed to apply the proceeds, or to invest a share and pay over the interest, they take a power of sale by implication.⁶

A direction to pay interest implies a power to invest⁷ and a power to "dispose of" land, implies a power to lease,⁸ where the remainder men are minors.

Although a direction in a will that land is to be sold for payment of testator's debts gives the executors a power of sale by implication,⁹ yet, under a devise of lands to several, to be equally divided between them "by sale or otherwise, as may be deemed best," the executor has no implied power to sell.¹⁰

¹ *Scott v. Morell*, 5 N. Y. Surr. (1 Redf.) 431, 3 Rev. Stat. 5 ed. 20, 21. §§ 75, 77; *Mapes v. Tyler*, 43 Barb. 421; 2 Rev. Stat. 3 ed. 14, § 56; 3 Cow. 651; 7 Wend. 47; *Matter of McLaughlin*, 2 Bradf. 107.

² *Peck v. Henderson*, 7 Yerg. 18; *Greenough v. Wells*, 10 Cush. 571, 577.

³ *Germond v. Jones*, 2 Hill, 659.

⁴ *Fowler v. Depau*, 26 Barb. 224.

⁵ *Jackson v. Burr*, 9 Johns. 104.

⁶ 4 Kent. Com. 319; *Dorland v. Dorland*, 2 Barb. 63; *Bogert v. Hertell*, 4 Hill, 492.

⁷ *Ackerman v. Emott*, 4 Barb. 626.

⁸ *Hedges v. Riker*, 5 Johns. Ch. 163.

⁹ *Peter v. Beverley*, 10 Pet. 533; *S. P. Taylor v. Benham*, 5 How. 233.

¹⁰ *Dunlap v. Pyle*, 5 McLean, 322.

A trust for "maintenance" will not usually authorize a sale.¹

A direction to raise a certain gross sum out of rents and profits is latterly held to authorize a sale, unless the testator refers to a mode of enjoying the property inconsistent with a sale, or otherwise shows an intention not to have the land sold, but that the charge should be raised only out of the annual rents.²

A power of sale in New York, given to three executors, is well exercised by one only, he alone having acted under the will.³ But a power to sell with consent of A. fails on the death of A. without having consented to, even though he did not dissent from, the execution of the power.⁴

Where a power is to be exercised, after certain conditions are fulfilled, it cannot be executed prior to such fulfilment.⁵ As to the time when a power may be exercised, where it is qualified by certain previous trusts,⁶ see *Matter of Vandervoort*.

As to the time when a trust power to sell can be exercised, see *Egerton v. Conklin*.⁷

§ 2. *Precatory Trusts.*

All difficulties of construction—whether it be a will or a deed that is the subject of interpretation—arise either from the words of grant being indistinct or else from an indefiniteness in the subject-matter or the object of the gift. In the case of a deed, a question rarely

¹ *Kingsland v. Betts*, 1 Edw. 596.

² *Wilson v. Halliley*, 1 Russ. & My. 590; *Bootle v. Blundell*, 1 Mer. 232.

³ *Taylor v. Morris*, 1 Comst. 341.

⁴ *Barber v. Cary*, 1 Kern. 397.

⁵ *Minot v. Prescott*, 14 Mass. 496.

⁶ 7 N. Y. Leg. Obs. 25.

⁷ 25 Wend. 224; see also *Bradhurst v. Bradhurst*, 1 Paige, 331.

arises whether the grantor intended to convey or not. He never uses any of the words "desire," "wish," or "will," but employs terms of present operation, as, for instance, "I give, grant, bargain and sell, stand seized of, enfeoff, convey, assign," &c. There is no ambiguity in such terms of present grant. But, in the case of a will, the draftsman often uses merely recommendatory expressions, as to which it is very hard to discover the sense in which they were most probably used by the testator. If he makes a gift directly to A., the question, indeed, is rarely entangled in any difficulty. But, when he devises or bequeaths to A., "wishing," "willing," "hoping," "trusting," or "not doubting," that A. will either immediately or at his death convey the same to B., the question arises, whether, in default of any appointment by A. to B., the latter, nevertheless, has the power executed to him by the construction which the court gives to the will.

Imperative powers of this kind are usually termed precatory trusts, or trusts by implication in default of appointment. The only distinction between the form of a limitation of a precatory trust and a trust by implication in default of appointment is, that an interest is conveyed to the donee of the power in the former case, but not in the latter. For instance, the phrase "I hope A. will appoint a sum of \$10,000 amongst B.'s children, and charge the same properly on the lands devised to B.," is an example of a precatory trust. But it would be a trust by implication to the children of B., in default of appointment by A., if the phrase ran, "I give unto A. the sum of \$10,000, now possessed by me in the public stocks, not doubting that he will convey the same at some time to the children of B." The legal incidents of these two kinds of limitation are, as regards the children of B., exactly the same.

They are not always so, however, as regards A., the trustee.

A leading case in the law of precatory trusts is *Harding v. Glyn*.¹ The rule as deducible from that case and from *Brown v. Higgs*² may be summarized as follows: A power to appoint is construed a trust in default of complete appointment, where the direction to appoint is imperative, and the subject-matter and objects of the power can be distinctly defined.

The law of precatory trusts, however, has undergone some changes in England within the last thirty years. It is also somewhat different in the United States from what prevails in the United Kingdom, while some of the States differ from others on the matter. We will, therefore, briefly sketch these differences in the present section, and illustrate our views by reference to a few leading cases. Questions of precatory trusts, on account of the diversities mentioned, elucidate, with singular distinctness of outline, most of the questions that arise on the construction of wills. For, these disputes always relate either to the meaning of the terms in which the gift is made, or else to its subject-matter or object.

The law of England has not undergone any appreciable change as to the nature of the terms by which alone a precatory power can be conferred. The cases have varied mainly as to the other two points mentioned, viz.: the certainty of the description of the subject or of the object of the gift. But, though the law has been uniform in requiring expressions of an imperative nature, yet the courts did not adopt the rules of construction applicable to similar limitations in deeds, but decided that various words and phases, not at all denoting a mandate in their primary or grammatical

¹ 2 White & Tud, Lead. Cas. 2d ed. 184; 1 Atk. 470.

² 4 Ves. 708.

sense, were, nevertheless, really imperative when found in wills.

In the early American cases on this question, the English latitude of construction was allowed, and any expression of recommendation by the testator that A. should give an interest to B., was regarded by the courts here as a trust for B., which he took, no matter whether A. acted or not on the discretion given him by the testator.¹

But a change is alleged to have come over the spirit of the judicial dream. Our courts now, sometimes, will not, with all their old readiness, construe every expression of desire as imperative. Jarman² and Redfield on Wills³ approve of this innovation, as effectuating the testator's intention better than the old latitude of construing as imperative trusts mere limitations that implied a discretion in the donee to use or not, as he pleased, the power conferred on him by the testator. We cannot agree with those authorities on this point. A testator recommends, instead of commanding, simply because he does not wish to give offense to the donee of the power, and also because he believes that the courts will carry out any wish of his declared in a will. Let us take the case of a person dying, and leaving after him a young widow and family. He will not show any want of confidence in her, because he knows that his children will be still more or less in her power. Now, almost all the cases where mere recommendations in wills have been construed trusts are instances of the kind mentioned. Truly, the courts acted most prudently in thus construing mere expressions of desire. But, it is said that no one would use such mild terms, unless he wished the trustee to have a discretion. No

¹ See *Collins v. Carlisle*, 7 B. Monr. 14; *Bull v. Bull*, 8 Conn. 47; *Prewett v. Land*, 36 Miss. 495; *Gamble v. Dabney*, 20 Texas, 69.

² Vol. I, 338.

³ Vol. II, p. 423.

testator, however, will refer at all in his will to any matter that he had not at heart. We think, therefore, the courts will act wisely in following, as much as possible, the good old rule, and turning the donee of a power into a trustee, except when the testator has plainly meant that the donee should have a discretion either to serve as a check upon the conduct of the beneficiary, or for some other reasonable motive.

The leading case upon the supposed American rule, which is not to consider a mere recommendation imperative, is *Gilbert v. Chapin*.¹ It was held in that case, that a devise to testator's widow and her heirs forever, "recommending" her to give the same to testator's children, created a fee simple in the widow and no interest in the children of the testator. This decision, however, has fortunately not been followed in the very similar case of *Warren v. Bates*.² The words in the latter case were, "in the full confidence," &c. And in *Reed v. Reed*,³ under a "wish" that the testator's son should give his grandson the gift bequeathed, the son was held to be constituted a trustee for the grandson.

It is stated in *Redfield on Wills*,⁴ that in some late cases in England the courts have exhibited an inclination to adopt the principle of *Gilbert v. Chapin*, and to treat recommendatory expressions in a will as dependent for their full force on the discretion of the donee of the power.⁵

On the whole, the question whether the old English rules on the question in *Gilbert v. Chapin* is to prevail may be considered as still *sub judice*, even in America. No doubt some mere suggestions by testators have been

¹ 19 Conn. 342.

² 98 Mass. 274.

³ 30 Ind. 313.

⁴ Vol. II, p. 425.

⁵ See *McCulloch v. McCulloch*, 11 Weekly Rep. 504; *Graves v. Graves*, 13 Irish C. 182; *Godfrey v. Godfrey*, 11 Weekly Rep. 554; *Scott v. Key*, 11 Jur. (N. S.) § 19; and *Hood v. Oglander*, 12 L. T. (N. S.) 626.

construed in England as imperative, although such seems not to have been the real intent of the testator. Still, a tendency in this direction is, we think, better than the rule in *Gilbert v. Chapin*.

If the question was not so mapped out by the decisions the natural rule would be for the courts to regard those cases where a testator is providing for his children, through the intervention of a trustee, as stronger than ordinary delegations of a power to a stranger for the benefit of strangers. Moral considerations require that a parent's dying wish, desire, or recommendation should be held as sacred as his most positive precept. Unfortunately, however, moral obligations have strained the doctrine in the contrary direction.

This question of precatory trusts elucidates very well the general rules for interpreting wills, and shows some strong instances where the primary meaning of terms has been controlled either by the context or external evidence. Of course the testamentary draftsman should leave nothing indefinite. At the same time he should avoid resort to technical terms, unless he fully understands their import and consequences. A little law, like a little learning, is a dangerous thing, and is often even worse than the pure simplicity of the layman.

Although an unexecuted discretionary power is as if it never existed, yet it is a general rule of construction applicable both to wills and deeds, that where a power is directed to be exercised in terms that are construed inoperative and not discretionary, the power is a trust, and will be executed by the court in default of appointment, in case the subject matter and objects of the power can be distinctly ascertained.¹ Three conditions, then, must concur in order that the power be deemed a trust,

¹ *Brown v. Higgs*, 4 Ves. 708; 8 Ves. 561.

or that the specified beneficiaries take trust interests by implication in default of appointment. These three conditions are: 1, imperativeness of request that the donee execute the power; 2, certainty of subject matter; and, 3, of object.¹ Judge Redfield² gives a strong opinion with respect to the natural value of mere hortatory expressions in a will.³ The adoption by statute of the rule in *Gilbert v. Chapin* is, however, not needed in England, if, as is alleged, the later cases run in the direction of the American rule.⁴ The opinion of Jarman, however, is of so much weight as to be likely to turn the scale in the direction referred to, if it has not veered thither already. No great progress, however, has yet been made in this respect. Even in many American cases as great latitude has been exhibited in the construction of terms as in England,⁵ so that the doctrine in *Gilbert v. Chapin* is by no means, as yet, firmly established here.

Of course, if it is plain from the will that the testator intended that the donee of the interest or power should have a choice as to the carrying out of the ulterior recommendation, there is no trust.⁶ Nor will the court interfere if the discretion given to the trustee is reasonably exercised by him.⁷

There are, indeed, but comparatively few American

¹ *Briggs v. Penny*, 3 Mac. & G. 554; *Harding v. Glyn*, 1 Atk. 469; *Wright v. Atkyns*, Turn. & Russ. 143; see notes to *Harding v. Glyn*, 2 W. & Tud. L. C. 2d ed. 184; 2 Story Eq. Jur. § 979 a; *Joel v. Mills*, 7 Jur. N. S. 389; *Little v. Neil*, 10 W. Rep. 592; 1 Jarm. (ed. 1861) 374.

² Vol. II, 423.

³ See *Gilbert v. Chapin*, 19 Conn. 342.

⁴ 1 Jarm. 363; *Bayne v. Crowther*, 20 Beav. 408.

⁵ See *Collins v. Carlisle*, 7 B. Monr. 14; *Bull v. Bull*, 8 Conn. 47; *Prewett v. Land*, 36 Miss. 495; *Gamble v. Dabney*, 20 Tex. 69.

⁶ *Erickson v. Willard*, 1 N. H. 217; *Lucas v. Lockhart*, 10 Sm. & Mar. 466.

⁷ *Sharon v. Simons*, 30 Vt. 458; *Hawes Place Society v. Hawes' Fund*, 5 Cush. 454.

cases on the question of precatory trusts. The whole doctrine, however, underwent a searching review in Coates' appeal,¹ decided by the Supreme Court of Pennsylvania. In that case the testator was possessed of considerable real and personal estate. He gave the "use, benefit and profits of his real estate to his wife for life, and also all his personalty, of whatever description, absolutely, in the full confidence that she would leave the *surplus* to be divided at her decease justly among his children." He then, after devising certain portions of his realty to his sons, and giving annuities to his daughters out of his personal estate, which were to cease on their marriage, went on to direct that in case the marriage or education of his children should make an addition to the *income* of his wife necessary, certain portions of his real estate should be sold, and the proceeds placed at her disposal. The court held that the widow took merely a life estate in the personalty as well as the realty, and that the word "surplus" meant that definite residue which would remain after the purposes first mentioned in the will were satisfied.

Rogers, J., when delivering judgment in that case, said: "Setting aside the words 'absolutely' and 'surplus'—of which I shall speak hereafter—it cannot be doubted that this case falls within the principle of the cases cited, and, particularly, of *Wright v. Atkyns*, 17 Ves." He then, further on, adds: "With the utmost deference to the wisdom of the profound jurists who seem to censure the judgment of their predecessors, I hope it will not be considered as presumptuous if I venture to adhere to and vindicate the propriety of the ancient doctrine."

The words "absolutely" and "surplus" certain-

¹ 2 Barr, 129.

ly militated against the judge's reasoning. The word "surplus," too, hardly admitted of the definite interpretation he put upon it. However, His Honor considered that none of the cases supposed to be adverse strictly applied, and, consequently, that it was a fit opportunity to uphold the doctrine of *Atkins v. Wright*, *Brown v. Higgs* and *Harding v. Glyn*.

In America, therefore, there is not perhaps the supposed tendency to depart from the spirit of these cases. Notwithstanding the array of text writers of a contrary opinion, there is no new current of any great strength in the late decisions. In *Brunson v. King*,¹ a testator had made a settlement at the time of his marriage, but retained in it a power of revocation by deed or will. In his will he expressly confirmed the settlement, and then afterwards expressed a "wish" which would be inconsistent with the previous confirmation. It was held that the "wish" was inoperative to engraft a trust upon the settlement. But, this decision was founded not upon the weakness of the precatory term to effectuate the intended trust, but on its inconsistency with the plain confirmation of a previous instrument executed for the most valuable consideration known to the law.

The English cases, up to the present time, do not appear to have seriously departed from the rule in *Brown v. Higgs*.² In the case of *Lawless v. Shaw*,³ for instance, the devisee was requested to continue an old steward in his office. This was held by the House of Lords not to be a precatory trust, since, as such, it would be inconsistent with the preceding plenary devise. Nor are the cases of *McCulloch v. McCulloch*,⁴ and *Graves v. Graves*,⁵ any great innovations towards the doctrine

¹ 2 Hill Ch. 483.

² *Ut sup.*

³ Lloyd & Gould, 154; s. c. 5 Cl. & Fin. 129.

⁴ 11 W. R. 504.

⁵ 13 Irish C. 182.

contended for. The doctrine in *Gilbert v. Chapin*,¹ is plausible in the abstract, but its practical faultiness is patent where, as in that case, the recommendation relates to the testator's own children, and the donee of the power is his wife. The reason for discarding mere hortatory expressions does not apply to such a case, because a testator purposely uses mild language to a wife, although if he thought she would fail in her parental duty towards their common offspring, he would be more explicit. Considerations of moral duty, however, unfortunately, have induced the courts to incline still further against holding the trusts imperative. For instance, a request to a parent to use the interest given him for his children's benefit is weaker in their behalf than if the request was made to a stranger.²

The opinion that the current of recent decisions is against converting the legatee into a trustee is supposed to derive confirmation from *Sale v. Moore*.³ But in *Sale v. Moore* the subject of the bequest was indefinite. A like observation is applicable to *Bardswell v. Bardswell*.⁴ The principle of *Harding v. Glyn* is at all events intact, and even though the subject be indivisible, or one object out of a class is to be selected by the trustee, the English Court of Chancery will nevertheless, even at the present day, if possible, execute the power.⁵ The tendency of the English courts latterly is even to execute precatory trusts, even if the objects are in terms indefinite, and in cases where formerly the trust would prob-

¹ 19 Conn. 342.

² *Brown v. Cassamajor*, 4 Ves. 498.

³ 1 Sim. 504; see *Hoy v. Master*, 6 Sim. 568.

⁴ 9 Sim. 319; *Le Maistre v. Bannister*, Prec. Ch. by Finch, 200, n. 1; *Pope v. Pope*, 10 Sim. 1.

⁵ *Richardson v. Chapman*, 7 Bro. P. C. 318, Toml. edit; *Moseley v. Moseley*, Rep. & Finch, 53; *Brown v. Higgs*, 5 Ves. 504; see *Cruwys v. Colman*, 9 Ves. 319.

ably have been held to be void for uncertainty. Especially will the trust be now enforced if the donee of the power take not the whole interest, but merely for life.¹ As Story, Jarman, Redfield, and White and Tudor, however, consider that the recent tenor of the cases is in conformity with their own views on this question, this will probably be the direction of future adjudications on questions of precatory trust, where the context is left doubtful by the existing decisions.

§ 3. *Terms of request.*

The expression of a mere wish or desire has been long held by the courts to be equivalent to an imperative direction.² The term "recommend," though sometimes not considered imperative in America,³ has been held in England to create a trust.⁴ A trust is also raised by the terms "request,"⁵ "wish and request,"⁶ "dying request,"⁷ "entreat,"⁸ "a last wish to daughter to give to grandchildren,"⁹ "desire,"¹⁰ "advised him to settle,"¹¹

¹ Howarth v. Dewell, 6 Jur. N. S. 1360.

² Malim v. Keighley, 2 Ves. 333; Knight v. Roulton, 11 Cl. & F. 513; Knight v. Knight, 3 B. 148; Briggs v. Penny, 3 Mac. & G. 546; Cary v. Cary, 2 Sch. & Lef. 189.

³ Gilbert v. Chapin, 19 Conn. 342.

⁴ Ford v. Fowler, 3 B. 146; see Johnson v. Rowlands, 2 De G. & Sm. 356; and Meggison v. Moore 2 Ves. Jr. 630; Knott v. Cotete, 2 Phill. C. C. 192.

⁵ Nowlan v. Neligan, 1 Bro. C. C. 489; Pierson v. Garnet, 2 Bro. C. C. 38, 226; Bernard v. Minshull, 1 Johns. 276.

⁶ Foley v. Parry, 2 My. & K. 138.

⁷ Pierson v. Garnet, 2 Br. C. C. 37, 226.

⁸ Prevost v. Clarke, 2 Mad. 458.

⁹ Hinxman v. Poynder, 5 Sim. 546.

¹⁰ Mason v. Limbury, cited in Vernon v. Vernon, Amb. 4; Cruwys v. Colman, 8 Ves. 319.

¹¹ Parker v. Bolton, 5 L. J. Ch. N. S. 98.

"to apply the same,"¹ "trusting,"² "in the full confidence" that he will give my children support,³ "confiding,"⁴ "with power,"⁵ "not doubting,"⁶ "it is my wish that my son shall add to the advancement he shall make to his son R.,"⁷ "well knowing,"⁸ "hoping,"⁹ "to be disposed of for the benefit of herself and her children,"¹⁰ "to be applied for" the maintenance of donee's children.¹¹ But the primary meaning of all these expressions, as interpreted by the preceding cases, may, as in all other instances, be controlled by the context.¹²

The following expressions standing alone, and not corroborated by the context, raise no trust: "liberality;" "justice;"¹³ "sovereign control over my property;"¹⁴ "to be disposed of in such way as my wife shall think proper;"¹⁵ "not doubting that she will consider my near relations;"¹⁶ or "discharge the trust re-

¹ *Salisbury v. Denton*, 3 Kay & J. 529.

² *Baker v. Mosley*, 12 Jur. 740.

³ *Warren v. Bates*, 98 Mass. 274; *Webb v. Wools*, 2 Sim. N. S. 267.

⁴ *Griffiths v. Evans*, 5 Beav. 241; *Wace v. Mallard*, 21 L. J. Ch. 355; *Gully v. Cregoe*, 24 B. 185; see *Winch v. Brutton*, 14 Sim. 379, and *Webb v. Wools*, 2 Sim. N. S. 267.

⁵ *Howarth v. Dewell*, 9 W. R. 27; *Massey v. Sherman*, Amb. 520; s. c. 1 Atk. 389.

⁶ *Parsons v. Baker*, 18 Ves. 476.

⁷ *Reed v. Reed*, 30 Ind. 313.

⁸ *Briggs v. Penny*, 3 Mac. & G. 546.

⁹ *Harland v. Trigg*, 1 Bro. C. C. 142.

¹⁰ *Crockett v. Crockett*, 2 Phill. 553; *Rankes v. Ward*, 1 Hare, 445; *Woods v. Woods*, 1 My & Cr. 401.

¹¹ *Browne v. Paull*, 1 Sim. N. S. § 92; *Costabadie v. Costabadie*, 6 Hare, 110; *Byrne v. Blackburn*, 26 B. 41; but see *Hammond v. Neame*, 1 Sim. 35.

¹² *Meredith v. Heneage*, 1 Sim. 542; 10 Price H. L. 706; *Winch v. Brutton*, 14 Sim. 379.

¹³ *Knight v. Boughton*, 11 Cl. & Fin. 513.

¹⁴ *Winch v. Brutton*, 14 Sim. 379.

¹⁵ *Johnson v. Rowlands*, 2 De G. & Sm. 356.

¹⁶ *Sale v. Moore*, 1 Sim. 534.

posed in him by remembering my children;"¹ "having full confidence in her sufficient and judicious provision for my dear children;"² "to enable her to maintain her children;"³ "remembering always the church and the poor."⁴

As to requests to continue tenants in the occupancy, see *Tibbets v. Tibbets*.⁵ As to retaining stewards in their office, see *Lawless v. Shaw*.⁶ As to the appointment of a certain person to an auditorship, or similar office, see *Williams v. Corbet*.⁷

Jarman is of opinion⁸ that many of the early cases, where wills and parts thereof were held void for uncertainty, would not be followed at the present day. Yet, with respect to precatory trusts, he considers⁹ that the courts are more rigid than formerly. This observation of this distinguished author, therefore, can only be correct as regards the meaning of the precatory terms.

§ 4. *Definiteness of subject-matter.*

The degree of certainty necessary to imbue a power with the incidents of a trust must be construed by the light of the general rules, according to which Chancery often cuts down an indefinite to a definite gift. In all such cases the court will execute the power, if it can by any means eliminate the element of uncertainty.¹⁰ Of

¹ *Bardswell v. Bardswell*, 9 Sim. 319.

² *Fox v. Fox*, 27 B. 301.

³ *Thorp v. Owen*, 2 Hare, 610; *Benson v. Whittam*, 5 Sim. 22.

⁴ *Curtis v. Rippon*, 5 Mad. 434; see also *Hart v. Hart*, 2 Dessaus, 83; *Farwell v. Jacobs*, 4 Mass. 634; *Bolling v. Bolling*, 5 Munf. 334; *Lydnor v. Lydnor*, 2 Munf. 263.

⁵ 19 Ves. 656.

⁶ *Ll. & G.* 154.

⁷ Vol. I, 316; vol. II, 349.

⁸ Vol. II, 349.

⁹ 8 Sim. 349.

¹⁰ *Thorp v. Owen*, 2 Hare, 610.

course, there will be no trust if the terms used by the testator, however certain, also imply that the donee of the power was invested with a discretion to exercise or not the power as he pleased, and to abstract and dispose of, or consume for his own benefit, the whole of the subject-matter of the power. Accordingly, no trust has been raised by the following phrases: "not doubting but that she will dispose of what shall be left at her death to our two grand-children;"¹ "what shall be remaining;"² "the bulk of my said residuary estate;"³ "what she may have saved;"⁴ "what they have."⁵

The implied gift is always co-extensive with the quantity of interest governed by the power. If the power be one to appoint in fee, the objects, therefore, take an implied fee in default of appointment.

Where money is given to purchase for the legatee a ring, house, annuity, &c., he takes the money in any event, and not merely for the particular trust directed by the testator.⁶ But, if the trustee has a discretion as to the amount to be thus expended, and lays out only part, the court will not interfere.⁷

Income, if directed to be applied for maintenance at the discretion of a trustee, does not pass to the assignees in bankruptcy of *cestuys que trust*. The discretion of the trustee in such a case will not be controlled by the court.

¹ Wynne v. Hawkins, 1 Bro. C. C. 179.

² Green v. Marsden, 1 Drew. 647.

³ Palmer v. Simmonds, 2 Drew. 221.

⁴ Cowan v. Harrison, 10 Hare, 234.

⁵ Lechmere v. Lavie, 2 My. & K. 197; but see Horwood v. West, 1 S. 1 St. 387.

⁶ Barlow v. Grant, 1 Vern. 255; Nevill v. Nevill, 2 Vern. 431.

⁷ *In re Sanderson's Trusts*, 3 Kay. & J. 497; and the residue will lapse: *Beevor v. Partridge*, 11 Sim. 229.

§ 5. *Definiteness of object.*

Definiteness of object is the third condition necessary to the raising of an imperative trust. The word "family" is a sufficient designation of objects.¹ The phrase, "our united relatives," however, was held to be void for indefiniteness in *Reeves v. Baker*.²

Under a power to appoint to relatives, only next of kin will take in default of appointment. But, the donee of the power may appoint to any relative, however remote.³ But, if the donee has merely a power of distribution, and not of selection, an appointment to relatives who are not next of kin will be void.⁴ If the power is to appoint to "nearest relatives," only next of kin can be appointees.⁵

The term survivors admits, as already shown, of various periods when the survivors are to be reckoned. A power to distribute or select, however, will be executed by the court amongst those who answer the description of the specified class at the period of the testator's death.⁶ But, if the donee of the power take a life interest, the class is then deemed to comprise only those who will suit the description at the death of the tenant for life.⁷ So, where the power is to be exercised by the donee at the time of his death, the class of objects will comprise only those then living.⁸

¹ *Wright v. Atkyns*, Coop. 111; overruling *Harland v. Trigg*, 1 Bro. C. C. 142.

² 18 B. 372.

³ *Harding v. Glyn*, 1 Atk. 469; 2 *White & Tud.* 685; see *Brown v. Higgs*, 5 Ves. 501; 8 Ves. 572.

⁴ *Pope v. Whitcombe*, 3 Mer. 689; see *Clapton v. Bulmer*, 10 Sim. 426; 5 My. & Cr. 108.

⁵ *Goodinge v. Goodinge*, 1 Ves. 231; *Edge v. Salisbury*, Amb. 70.

⁶ *Cole v. Wade*, 16 Ves. 27.

⁷ See *Birch v. Wade*, 3 V. & B. 95.

⁸ *Pierson v. Garnet*, 2 Bro. C. C. 38, 226.

The objects too, taking in default of appointment are only those who survive the donee. For to such only could an express appointment be made by the donee, and the implication is only an echo of the express power.¹ Jarman thinks² that an implied gift to relatives will only comprise those who survive the donee of the power, even if its exercise may be by deed as well as by will. But there seems to be no reason for thus construing an implied gift to relations in a way different from the ordinary construction of an implied gift to a class, although English authority is in favor of Jarman's view.

Where the bequest was to such persons as A. shall appoint, and, in default of appointment, to his surviving brothers and sisters, the period of survivorship was held to relate to the death of A. But where objects of a special power take in default of appointment, their interest is vested from their birth. The rule in *Davies v. Thorns* was laid down in analogy to the doctrine in *Cripps v. Woolcot*.³

There is no implied gift to the class where there is an express gift over in default of appointment to or among the class.⁴ When the trust is executed by the court, in favor of the class they take individually or *per capita* as joint tenants, though by the statute they might only claim *per stirpes*.⁵

An express gift to the objects of the power, in case its donee dies before the testator, will not prevent them from taking by implication in default of appointment.⁶

¹ See *Kennedy v. Kingston*, 2 Jac. & W. 431.

² Vol. I, 486.

³ *Davies v. Thorns*, 3 De. G. & Sm. 347.

⁴ *Davidson v. Proctor*, 14 Jur. 31; *Walsh v. Acton*, 4 Ves. 171; *Bird v. Wood*, 2 S. & S. 400.

⁵ *Walter v. Maunde*, 19 Ves. 428.

⁶ *Kennedy v. Kingston*, 2 Jac. & Walk. 431.

But an express gift to them in default of appointment will have this effect according to the maxim, that an express gift precludes implication, and if the gift in default of appointment is to other objects as well as those contemplated in the power, a qualification imposed on the former will not be necessarily extended to the latter.¹

Sometimes the donee of the power and its objects will take jointly.² But this rule is not of very frequent application.³ If the donee of the fund or power be a parent of the ulterior beneficiaries, he will, in a doubtful case, be more likely to be decreed to take the absolute interest, than if he is no relative of the other parties.⁴ A devise with an absolute power has been in some American cases held to create no trust, even though there be quasi precatory terms added.⁵

If the gift be clearly in trust, and the trust fail through uncertainty, there is a resulting trust to the testator's heir or next of kin, according as the subject matter of the gift is realty or personalty.⁶ The doctrine in *Burgess v. Wheate*⁷ does not apply in these cases. But if the gift be couched in absolute terms, subsequent precatory words will not cut it down to a mere trust.⁸

¹ *Smith v. Death*, 5 Madd. 371.

² *Jubber v. Jubber*, 9 Sim. 503; *Chambers v. Atkins*, 1 Sim. & Stu. 282; *Re Harris*, 7 Exch. 344.

³ *Crockett v. Crockett*, 2 Phill. C. C. 553.

⁴ *Thorp v. Owen*, 2 Hare, 607.

⁵ *Kinter v. Jenks*, 43 Penn. St. 448; citing *Heath v. Knapp*, 10 Watts, 405; 4 Penn. St. 228.

⁶ *Fowler v. Garlike*, 1 R. & My. 232; *Stubbs v. Sargon*, 2 Keen. 253; *Briggs v. Penny*, 3 Mac. & G. 546; *Bernard v. Minshull*, 1 Johns. 276.

⁷ 1 Eden, 92.

⁸ *Bonser v. Kinnear*, 2 Gif. 195; see *Wells v. Doane*, 3 Gray, 201; *ex parte Payne*, 2 You. & C. 636; 2 Jarm; 342.

Where an interest and not merely a power is transferred to the trustee, any property not required for the purposes of the trust will thus sometimes belong to the trustee beneficially, and there will be no resulting trust for the testator's heir at law or next of kin.¹ Even when the court will execute the trust, yet, if it be a trust by implication, that is to say, if an interest and not a mere power be given to the donee, he will during his life have all the incidents of propriety, as, for instance, the right to fell timber.²

Indefiniteness of object, it must be remembered, does not defeat a charitable use according to the preceding rules.³

The testamentary draftsman should carefully avoid all ambiguous directions, and state clearly, whether each trust was intended to be imperative, or was left wholly in the discretion of the trustee. Unless the will is thus explicit, or else has been drawn after an approved technical model, it is likely to be litigated in the present supposed shifting state of the authorities both here and in England, respecting precatory trusts or trust powers.

When the power is one of distribution, the implied beneficiaries take as tenants in common. But if the power is one of selection, they take as joint tenants. This is Jarman's opinion.⁴ The distinction, however, seems refined, and as equity constitutes donees under executory trusts tenants in common, there is reason to contend that, in the absence of authority on the point, equity would regard the trust as so far executory, and

¹ Wood v. Cox, 2 My. & Cr. 684.

² Wright v. Atkins, 17 Ves. 255.

³ See chap. 26, *infra* § 6, Charitable Uses.

⁴ Vol. II. 168.

requiring the substantial action of the court, as to enable it to use its whole equitable functions, and to constitute the beneficiaries tenants in common.

Where the property is given in default of appointment to persons individually (and not as a class), as tenants in common, and one of them dies in the lifetime of the testator, the power and the gift lapse *pro tanto*. But, if all survive the testator, and one dies afterwards, the power still remains as to the whole. The distinction seems to be founded in reason. The power being one of distribution only is an accessory of the gift, and, when the principal lapses *pro tanto*, the accessory follows *pro rata*. But when the gifts all vest by reason of the beneficiaries surviving the testator, the power also is rendered indefeasible, and may be exercised irrespective of events not expressly limiting its execution. The distinction is at all events established by authority.¹ If the objects are joint tenants, or a class, neither the gift nor power can suffer by lapse, unless all the members, or all but one, die in the lifetime of the testator.

As an appointment cannot be made to a deceased child whose share under the gift once had vested, the only way in which the property can reach him is to leave a part unappointed. The representatives of the deceased child will then take his share in this unappointed portion.

In England at present, under a power of distribution, only a nominal share need be appointed to each member of the class. But, it is still necessary to give even a nominal share to each member, or the omission

¹ See 2 Jarm. 168, note; 1 Sug. Pow. 6. ed. 534.

will be fatal to the appointment. In the United States it is necessary to give not only a nominal but a substantial share (as in England before the Act on Illusory Appointments), to each member of the class of donees, except in those States where this doctrine of equity has been altered by statute or construction.

CHAPTER XVIII.

INCUMBRANCES.

§ 1. *Mortgages.*

At common law, lands were not liable for debts. The theory of the feudal system was, that land, when held by military tenure or freehold, was an *honorarium*, or honorable stipend for public services, and that it was contrary to principles of public policy that such a stipend should be liable to be sequestrated, and the military tenant thus incapacitated from defending his country in war. Under Edward I, this rule was altered, and half the lands of the freeholder were liable to be extended. They were not, however, made liable in England for debts in general after the death of the incumbrancer, until the last reign. Even now, except where a statutory provision applies to the contrary, the personalty is the primary fund for the discharge of a testator's debts. It is thus always important to know what the common law rule on a point is, since, unless statute law covers the whole area of the common law rule, the remainder of the ground remains still subject to the old law. Hence has partly arisen the doctrine that the heir, and sometimes the devisee as representing the heir, is favored in law. The reason is, he was so favored at common law, and statutory provisions have not yet canceled all his rights. It is only as regards rules of law, however, and the incidents of property, that the heir is favored. So far as rules of construction

are concerned, equally strong language appears necessary to defeat the rights of the testator's next of kin to personality as the rights of the heir to realty.

• The personality was formerly, in England, the primary fund for the payment of mortgage debts, and is still such in almost all of the United States. The devisee of a mortgaged estate in England did not, prior to the change in the law referred to, take the land with its incumbrance, even when the devise to him was expressly "subject to the mortgage debt." This description, it was thought, was specific, and related to the identification of the land. A different construction is put upon the word "subject" in the United States.¹ Even when the property devised subject to the mortgage was given upon trust for sale, and the proceeds were to be applied in the first instance in payment of the mortgage debt, yet the devisees of the residue of the proceeds were held entitled in England to exoneration out of the personality.² But if a particular provision be made for payment of the debt out of the mortgaged land, and only the remaining interest is devised, the land mortgaged was the primary fund for payment. So any express charge of the debt on it makes it the primary means for payment; otherwise the express charge would have no force.³

The case of *Van Winkle v. Van Houten*⁴ shows that the rights of a devisee of mortgaged land are not as strictly guarded in the United States as in England, with respect to the present point, prior to the passing of the 17 & 18 Vict. c. 113. The English cases, therefore, on this whole doctrine are by no means conclusive

¹ *Van Winkle v. Van Houten*, 2 Green. Ch. 172.

² See *Bickham v. Cruttwell*, 3 My. & Cr. 763; *Wythe v. Henniker*, 2 Myl. & Kee. 635.

³ *Evans v. Cockeram*, 1 Coll. 428.

⁴ 2 Green. Ch. 172.

authorities here, except where the construction is not founded on partiality towards the heir, but on the ordinary grammatical meaning of the words in question. The heir, indeed, is not favored to the extent supposed, if at all, in questions of construction. The case of *Forth v. Chapman*¹ shows that in some cases the next of kin are more favored. However, our courts will hold the scales evenly between heirs, next of kin, and beneficiaries.

The personalty continues to be the primary fund for payment of debts and legacies, even though the real estate be charged with such,² or there be a direction to pay the charges out of the income of the real estate.³ Nor is the devisee of a mortgaged estate entitled to exoneration out of personalty specifically bequeathed, or out of pecuniary legacies. Neither is he entitled to exoneration at all, if the mortgage debt or charge was not contracted by his testator, but devolved on him with the land by devise, descent, or purchase,⁴ unless he did an act amounting to an adoption or *quasi* novation of the charge.⁵

The reason of the distinction is, that where the testator himself was the mortgagor, his personalty was benefited, and ought to recoup. But where he merely took the land subject to the burden, his personalty was not increased by the mortgage.⁶

As to what acts will amount to an adoption of the mortgage, so as to transfer its primary onus to the devisee's personalty, see the notes to *Duke of Ancaster*

¹ 1 P. Wms. 163.

² *Lupton v. Lupton*, 2 Johns. Ch. 614; *McKay v. Green*, 3 *Id.* 56.

³ *Hawley v. James*, 5 Paige, 318, 448, 469.

⁴ But see *Thompson v. Thompson*, 4 Ohio, N. S. 333.

⁵ See *Cumberland v. Codrington*, 3 Johns. Ch. 229; 2 Story Eq. Jur. § 1248; 4 Kent, 5 ed. 420.

⁶ See *Hughes v. Dehon*, 3 Gray, 205.

v. Mayer.¹ Giving a bond or covenant on the transfer of the mortgage will not have this effect. But, if the mortgagee be a party to the transaction, the case may, with a slight variation of circumstances, involve an adoption of the debt, as between the real and personal representatives of the owner of the land mortgaged. Of course, any explicit act *inter vivos*, or plain intimation in the will, will vary the rights of the mortgagee's heir or devisee and next of kin. Yet, to shift the burden from realty to personalty, the testator must have directly contracted to meet it, or else expressed a clear intention in his will that the personalty was to be the primary fund for satisfaction of the debt.²

Seem, the implied adoption of a mortgage by a testator must work a novation of the real contract, in order to alter the relative rights of his real and personal representatives. It must be not a mere personal covenant even with the mortgagee, but a fresh or an additional charge on the land as by inserting a new proviso for redemption, or else it must be a plain purchase, not merely of the equity of redemption, but of the mortgagee's whole interest in the land.³ This distinction may perhaps reconcile the cases on this point.

The devisee of a mortgaged estate is entitled to exoneration⁴ out of: 1, the general personalty; 2, lands expressly devised for payment of debts; 3, lands descended to the heir; 4, lands charged with debts. If such charge on land be general, the devisee of the burthened land contributes rateably. If no land be charged, and classes 1, 2 and 3 are exhausted, the de-

¹ 1 White & Tud. Lead. Cas. Eq. 2d. ed. 505 *et seq.*

² *Cumberland v. Codrington*, 3 Johns. Ch. 229, 272; see *Hunter v. Hunter*, 17 Barb. 25.

³ *Cope v. Cope*, Salk. 449; see 4 Kent, 5 ed. 421, *Earl of Oxford v. Lady Rodney*, 14 Ves. 417.

⁴ *Hewes v. Dehon*, 3 Gray, 295.

vised estate bears its own burden. Class 3 is entitled to exoneration out of classes 1 and 2.¹ If one person ultimately unites in himself both characters of mortgagor and mortgagee, the mortgage will be presumed to become extinguished, unless it be better for the owner or his creditors to regard the security as still subsisting.² If mesne estates subsist between the charge and the fee, this is no merger of the mortgage. If a merger once occurs at law, however, equity cannot revive the charge. The personal representatives of the owner never have an equity against the heir, nor conversely.

The cogent nature of an old rule of law is very well shown by the course of the decisions on 17 & 18 Vict. c. 113. It was at first thought that as strong language was required to exonerate the mortgaged estate from the mortgage debt as is necessary to release the personality in other cases from its primary liability to the payment of the testator's debts. But, it has been held that if the mortgaged estate is specifically devised without reference to the mortgage, and there is another fund mentioned in the will for the payment of debts, the act 17 & 18 Vict. c. 113, which exonerates the personality in England, will apply. To exonerate personality, however, in other cases, from its primary liability to debts, not only must the realty be charged, but the personality must be excepted, either expressly or by necessary implication. This strong rule originated at a period when the rights of the heir were scrupulously protected by the courts. But, as the law is not presumed to favor a residuary legatee or the next of kin, the reason of the rule regarding the favor shown to realty in a charge of

¹ As to exoneration, see further, 1 Story, Eq. Jur. § 572-4, 2 *Ib.* § 1245-1247, a; *Livingstone v. Newkirk*, 3 Johns. Ch. 319.

² *Domisthorpe v. Porter*, 1 Ed. 162.

debts thereon did not seem to apply¹ to a statute exonerating mere personalty.

The decision in *Mellish v. Vallins*, however, does not appear to be as consistent with sound principle as is commonly alleged. No doubt, the rule under the old law that a devise of land "subject to the mortgage debt"² did not exonerate the personalty, was extreme. But, where there is a course of decisions showing what is the meaning of a primary liability, a statute is presumed to be founded on the principles of adjudication already recognised, unless it expressly provides to the contrary. The 17 & 18 Vict. c. 113 was intended to put the statutory rule of construction on the same footing as the old rule respecting personalty. To say that the statute adopted no new rule of construction is a begging of the question either way, and chiefly in favor of the view that would regard the act as requiring an exoneration to be made according to the recorded judicial definition of the language necessary to exonerate. A statutory rule is surely as strong as a common law or rather Judge-made one.

If the court, in *Mellish v. Vallins*, considered that less strong expressions would be needful to transfer a liability to, than from, the personalty, as against an heir or devisee, some decisions perhaps would be found to support this position. But, the distinction the Vice-Chancellor drew is one not of degree but of kind, which does not seem to be strictly applicable where the express words of a statute are in question. The principle of *Mellish v. Vallins* is calculated to introduce much uncertainty in cases falling under new acts, which reverse or rather are intended to reverse old rules. The statu-

¹ *Mellish v. Vallins*, 2 Jo. & H. 194.

² *Bickham v. Cruttwell*, 3 My. & Cr. 763.

tory rule, it seems, will not, in England, be moulded by analogy to the one it displaced, but may be based by the judges on new principles of their own. It is true that the decision in *Mellish v. Vallins* is sound sense. But, it is doubtful whether a diversity of rules of construction is not a greater evil than a partial infusion of sense. The rule established by the case referred to has been since altered by statute.¹ But the statutory alteration ought rather to have been to assimilate the other cases, to *Mellish v. Vallins*, especially as this last case seems to have received the approbation of the profession. These questions are certain soon to arise in the United States. In a few States the mortgaged land is already the primary fund for payment of the mortgage. This rule will probably be soon adopted in all the other States, as it is in harmony with the general tenor of our legislation, which seeks to assimilate the incidents of real estate to those of personalty.

§ 2. *Charges.*

An heir was only bound, at common law, by such debts of his ancestor as were under seal and expressly binding the heir. A devisee of land was not liable until the 3 & 4 Wm. & M. c. 14; nor was either the heir or devisee liable, in England, to simple contract creditors of a testator until 3 & 4 Wm. 4, c. 104. Even now, both in England and the United States, the testator's personalty is the primary fund for the payment of debts, and specialty creditors still take priority, unless levelled by a charge of debts in the will. But, if the charge of debts is merely general, a purchaser for value of the lands is not bound to see to the application of the purchase money. *Aliter*, if the debts, charges, or

¹ 30 & 31 Vict. c. 69.

legacies are specified¹ in any will or deed forming part of the title to the land in question. Two questions - thus arise in respect to a charge of debts or legacies, viz.: first, whether the charge is effectual; and, secondly, whether it inverts or disturbs in any way the natural order of administering the real and personal estate.

The personalty is, in almost all of the American States, the primary fund for discharging debts, even by mortgage,² unless the testator otherwise directs; and here, as well as in England, land is not liable for legacies, unless they are charged thereon; and a doubtful clause will, it seems, be interpreted favorably to the heir or devisee.³

An annuity, likewise, is payable only out of the personalty, and not out of the realty, either devised or descended;⁴ and even when payable out of real and personal estate, the land is still liable only on a deficiency of personal assets, unless the testator provides to the contrary.

After giving a legacy, a testator devised "the balance" of his estate to other persons. On a deficiency of assets, the legacy was held to be charged on the real estate.⁵

In determining whether a legacy is charged on real estate, the courts in America have sometimes admitted

¹ See *Harris v. Fly*, 7 Paige, 421; *Baylor v. Dejarnette*, 13 Gratt. 152; *Pickering v. Pickering*, 15 N. H. 281; *Mahar v. O'Hara*, 4 Gilm. 424; *Dodge v. Manning*, 11 Paige, 334.

² 2 *Williams' Ex.* (2 Am. ed.) 1215; *Garnet v. Macon*, 6 Call. 608; s. c. 2 Brock, 185; *Adams v. Brackett*, 5 Met. 280.

³ See 2 Story Eq. Jur. § 1246; *Lewis v. Thornton*, 6 Munf. 87. As to charges on land, see further, *Gray v. McDowell*, 6 Bush. (Ky.) 475; *Gerken's Estate*, 1 Tuck. (N. Y. Surr.), 49; *Okeson's Appeal*, 59 Pa. St. 99; *Baker's Appeal*, 59 Pa. St. 313; *Miller's Appeal*, 60 Pa. St. 404.

⁴ See *Hume v. Wood*, 8 Pick. 478.

⁵ *Roman Catholic German Church of Albany v. Wachter*, 42 Barb. 43.

parol evidence of the nature of the property and circumstances of the testator.¹ Such an ambiguity is sometimes, also, construed in England with the aid of parol evidence. Thus, where renewal fines or other charges are directed to be raised out of rents and profits, the value of the annual rents will be considered by the court, as to the question whether the charge is confined to the annual rents, or may be raised by a sale of the land.²

To exonerate the personalty from its primary liability to the testator's debts, not only positive words of charge must be used as to the realty, but negative words of exception must be also predicated, expressly or by necessary implication, of the personalty.³ Therefore, neither a charge of debts on all or a part of the testator's lands, nor a devise upon trust for sale, nor the creation of a term for such a purpose, exonerates the personalty. Thus, in *Bridgman v. Dove*,⁴ land was devised to A., he paying the debts and legacies. Yet the personalty was held not to be exonerated. Even if it is expressly subjected only to a few debts, yet it continues primarily subject to all.

The personalty is exonerated if the realty is directed to be sold to pay debts, and the residue is to "be added to the testator's personal estate."⁵ But an exception expressly in favor of a legatee does not necessarily enure for the benefit of the next of kin in case of a lapse.⁶ If,

¹ *Dey v. Dey*, 4 C. E. Green, 137.

² See *Allan v. Backhouse*, 2 Ves. & Bea. 65; *Shaftesbury v. Duke of Marlborough*, 3 Law Jour. N. S. 30.

³ *Schermerhorn v. Barhydt*, 9 Paige, 29, 49; see *Duke of Ancaster v. Mayer*, 1 White & Tud. Lead. Cas. and notes thereto, 2d ed. 505, *et seq.*

⁴ 3 Atk. 201; but see *Lockhart v. Hardy*, 9 B. 397.

⁵ *Holliday v. Bowman*, cit. 1 B. C. C. 145.

⁶ See 2 Jarm. 592.

however, the land is charged and the whole personal estate is bequeathed specifically and not as a residue, the personalty is exonerated.¹

An exoneration of the personalty in favor of A. does not by the lapse of A.'s legacy enure to the benefit of the executor or next of kin.² But, a direction to pay debts charges all the land devised to executors jointly, whether or not they take any beneficial interest in it, and will usually give them the legal fee. But, such a direction is no charge on land not devised to executors, where there is no word referring directly or indirectly to the land.³ However, a direction by a testator that his debts shall be paid *by his executors*, charges in England all the real estate devised to them,⁴ but no other land. Yet, if the testator omitted the reference to his executors, the direction to pay his debts would, in England, amount to charging them on all his land whether devised or not, on the ground that the clause would otherwise be inoperative.⁵ But, in the United States, a mere direction to pay debts and legacies does not amount to a charge thereof on the testator's real estate.⁶ Yet, if there is a devise of land "after payment of debts and legacies," or when the debts and legacies are "first" paid, the land is charged.⁷ If the words used be sufficient to charge the land devised, *a fortiori*, they would seem to charge lands descended, where the charge is not on the specific lands devised, but is con-

¹ *Larke v. Mann*, 53 Barb. 267; *Lance v. Aglionby* 27 B. 65; *Collis v. Robins*, 1 De G. & Sm. 131; *Rhodés v. Rudge*, 1 Sim. 79.

² 1 Rep. Leg. by White, 744.

³ See *Dowling v. Hudson*, 17 B. 248.

⁴ *Henvell v. Whitaker*, 3 Russ. 343.

⁵ *Clifford v. Lewis*, 6 Madd. 33; *Cook v. Dawson*, 29 B. 126.

⁶ *Lupton v. Lupton*. 2 Johns. Ch. 624.

⁷ *Id.*

tained in the general phrase, "after my just debts are paid, &c."¹

As to powers to executors to sell, see further *Hunier v. Rogers*.²

Questions of exoneration are more difficult than those relating to charges simply. An exoneration of the personalty, however, or a transfer of the primary liability of one fund to another, may be made by the testator not only expressly, but also by implication.³

Legacies are charged on the land where the "residue" of the realty and personalty is bequeathed in one mass.⁴ But a charge of legacies on all the real estate of the testator does not charge lands specifically devised.⁵ In *Conron v. Conron*, the testator used every conceivable device known to the period for charging real estate, yet his intention failed. The House of Lords proved too subtle for him. If the charge included debts, however, as well as legacies, the debts being then a charge on lands specifically devised, would have fastened the legacies also on the specific devises.

Where a testator devised to one of his sons two third parts of a certain farm, with a limitation that all his just debts should be paid, this was held to charge both the land and the devisee.⁶ The words, "after my debts and funeral charges are paid, I devise," &c., have also been held to charge the land with the payment of the

¹ See *Shallcross v. Finden*, 3 Ves. 738.

² 55 Barb. N. Y. 85; *Dunshee v. Goldbacher*, 56 Barb. (N. Y.) 579; 8 Abb. (N. Y.) Pr. N. S. 439; *Dodge v. Moore*, 100 Mass. 335; *Cook v. Cook*, 20 N. J. Eq. (5 C. E. Gr.) 375.

³ *Bugbee v. Sargent*, 27 Me. 338; see *Reynolds v. Reynolds*, 16 N. Y. 257; *Harris v. Fly*, 7 Paige, 421.

⁴ *Greville v. Browne*, 7 H. L. C. 697.

⁵ *Conron v. Conron*, 7 H. L. C. 168.

⁶ *Gardner v. Gardner*, 3 Mass. 178; see *Sands v. Champlin*, 1 Story C. Ct. 376.

debts and funeral charges.¹ But the word "estate" alone will not charge the land with debts.²

In *Norris v. Beyea*,³ where legacies charged with an annuity in equal portions became unequal by lapse and survivorship, the annuity was apportioned to the value of the interest taken by the legatees and the representative of a deceased legatee respectively. In *Lawrence v. Holden*,⁴ a devise to testator's widow, of a house free and clear of all incumbrances, was held not to compel the executors to pay the current taxes and assessments out of the testator's general estate.

The personalty is primarily applied to pay legacies when charged on land, as well as debts.

As to the personal liability of devisees to pay charges on their devises, see *Wood v. Wood*.⁵

Assumpsit, however, does not lie by a legatee against the devisee of land charged with the legacy, unless he accepts the devise and promises to pay the legacy.⁶

A charge on the estate does not necessarily give the devisee the fee, even though the amount of the charge be greater than the value of the life estate.⁷ Where a devisee of land is directed to pay "thereout," or "out of the estate," certain legacies, these are charges on the estate, yet they do not by implication enlarge the devise to a fee.⁸ A trust established, however, for the pay-

¹ *Fenwick v. Chapman*, 9 Pet. 461; *Wright v. West*, 1 Cranch C. Ct. 303; see *McCullock v. McLain*, *Id.* 304.

² *Archer v. Deneale*, 1 Pet. 585.

³ 13 N. Y. (3 Kern.) 273.

⁴ 3 Bradf. 142; see *Smith v. Wyckoff*, 3 Sandf. Ch. 77.

⁵ 26 Barb. 356.

⁶ *Gridley v. Gridley*, 33 Barb. N. Y. 25.

⁷ *Olmstead v. Olmstead*, 4 Comst. 56.

⁸ *Gardner v. Gardner*, 3 Mason, 178; S. C. 12 Wheat. 498; *Taft v. Morse*, 4 Met. 523.

ment of charges to continue until a child arrives at a certain age, will not, as a rule, be determined by the child's death before the period specified.¹

Doubtful words will not release the personalty from its primary liability to the testator's creditors.² Indeed, if words anywhere in a will are not interpreted by the context, they will receive only their legal import.³

The fact that a State law renders lands liable to the payment of a testator's debts, will not affect the construction of a charge of debts in the will. And if the creditors will not levy off the property specifically allotted for the payment of their debts, the devisees of such property can marshal.⁴ Debts specifically charged, and not coupled with a general charge of debts, will bind a purchaser from the devisee of the land so charged, in the United States as well as in England.⁵

The priority of the order of charges will sometimes depend mainly on the order in which they are mentioned in the will.⁶ The real estate, however, is rendered the primary fund more readily where the charge is of a specific debt, such as a mortgage, than where there is a general charge of debts.⁷ If a specific portion of *personalty* is appropriated for payment of debts, that portion, unlike land, is the primary fund.⁸

§ 3. *A sole fund.*

The real and personal estate are wholly administered *pari passu*, where the testator directs his land

¹ Hawley v. James, 5 Paige, 318, 462.

² Leaver v. Lewis, 14 Mass. 87; 18 Pick. 29.

³ Annable v. Patch, 3 Pick. 363.

⁴ Potter v. Gardner, 12 Wheat. 498, Supreme Ct. 1827.

⁵ Morancy v. Quarles, 1 McLean, 194.

⁶ Smith v. Wyckoffe, 3 Sandf. Ch. 77.

⁷ Evans v. Cockeram, 1 Coll. 428. ⁸ Bootle v. Blundell, 1 Mer. 193.

to be sold, and mixes up the proceeds with his personalty in one common fund, charged either with debts, legacies or annuities.¹ Sometimes the real estate is the sole fund liable to the charge. This happens where there is a direction to sell land and to pay a certain specified sum not a debt, out of the proceeds. In other cases, if the real fund proves deficient, the personalty may be only secondarily liable.² In other words, the legacy will be demonstrative and not specific,³ and therefore, will not be adeemed if the testator sells the land.

Where the charge is in its nature real, as a jointure or portions under a power, or a devise with a direction to pay certain sums of money, as distinguished from a trust for debts or legacies generally, the personalty is not at all liable.⁴

§ 4. *Dower.*

Dower being a common law right, the presumption is against a widow's being put to her election respecting her dower. Therefore, neither a bequest to her, nor a trust for sale,⁵ nor a devise of part of the land, nor a charge on the whole land, nor a devise of the land to a third person defeats her claim to dower on the remainder. Even a legacy to her of a share of the proceeds of land directed to be sold will not be deemed absolutely irreconcilable with her claim to dower, but the lands will be sold subject to her dower. So, a direction as to the surplus rents will imply that the natural order of

¹ *Roberts v. Walker*, 1 R. & My. 752; *Kidney v. Coussmaker*, 1 Ves. J. 436; 2 Ves. J. 267; *Tracy v. Tracy*, 15 Barb. 503; *Whitman v. Norton*, 6 Binn. 395; *Taft v. Morse*, 4 Met. 523.

² *Hawkins*, p. 290.

³ *Foote Appt.* 22 Pick. 299.

⁴ 2 Sp. 819; 1 Rop. Leg by White, 731-2.

⁵ *Holdich v. Holdich*, 2 Y. & C. C. C. 18; *Gibson v. Gibson*, 1 Drew. 42.

the charges thereon is left undisturbed. In *Gibson v. Gibson*,¹ even a direction touching the rents until sale was held not to put the widow to an election. This case has gone to the very verge of the law. The question in all such cases is, whether the dispositions are absolutely and totally inconsistent with the claim to dower. If by possibility, or by conceiving any state of facts, no matter how improbable, the whole will may be rendered consistent with the wife's common law rights, these will prevail. This principle is frequently acted upon under wills as to the meaning of words and the effect of charges. The primary import of the word or charge will not be changed for a secondary sense, if the primary force of the terms used can have *any* operation.²

It is a rule of construction in America, that equality in the disposition of property by parents among their children is to be favored, and doubtful words will be so construed.³ A widow's claims under a will are also favorably regarded. In *Gale v. Gale*,⁴ a testator bequeathed a homestead to his widow, or an alternative sum of \$1,000, payable within five years after his death, or sooner, if she should prefer to use it in the erection of a house on a certain lot. It was held that the widow could not be barred in her election prior to the expiration of the five years, or prior to a tender by the executors of the alternative devise.

In Massachusetts, the testator's widow may take a third of the residue of the personalty in addition to any gift under the will.⁵ In that State and New York, a

¹ *Ib.*

² See Part 1, Prop. II; *infra*, chap. 23, § 5.

³ *Horwitz v. Norris*, 60 Pa. St. 261.

⁴ 48 Ill. 471.

⁵ *Kempton Appl.* 23 Pick. 163; see *Crane v. Crane*, 17 Pick. 422; see Mass. Rev. Stat. c. 60, § 11.

widow is presumed to elect in favor of the will, in case she does no positive act of election within the statutory period. But in England a beneficiary is always presumed to elect against the instrument in question, except that the court will elect for an infant in the manner most advantageous for him. In Illinois, any provision by will is presumed to bar dower, unless the widow repudiate the gift within six months.¹

The phrase "subject to the dower and thirds of my wife," does not entitle the wife to a share in the personality, the meaning of the phrase referred to being well known.²

A legacy to the wife in lieu of dower fails by reason of her electing to take dower.³ But a devise of testator's whole estate, with remainders over, is not necessarily in lieu of dower, and she may take one-third as dowress and the remainder as devisee.⁴ However, a provision for the widow under a trust vesting the entire legal estate in trustees is inconsistent with her right to dower,⁵ and puts her to an election between the testamentary provision and her dower. A general devise of the testator's real estate does not necessarily compel the widow to elect between her dower and a legacy given her in the will. She can retain it and all other benefits given her by the will, unless her retention of her dower operates to defeat some other disposition in the instrument.⁶ Thus, if the testator's land is devised to his widow and his children, equally to be divided between them, this excludes her dower.⁷ But a mere annuity, payable

¹ Ill. Rev. Stat. 1833, p. 624 ; see 1 Jarm. 342, 'note by Judge Perkins.

² O'Hara v. Sullivan, 30 How. Pr. 278.

³ Hawley v. James, 5 Paige, 318.

⁴ Lewis v. Smith, 9 N. Y. (5 Seld.) 502.

⁵ Savage v. Burnham, 17 N. Y. (3 Smith), 561.

⁶ See Chalmers v. Storril, 2 Ves. & B. 222.

⁷ *Id.*

out of the dower land, is not inconsistent with a claim of dower. There must be an absolute inconsistency between the claim of a beneficiary and the dispositions in a will to raise a case of election.¹ An election, however, must be made by her if there is a devise, either to herself or to others, inconsistent with her claim to dower. Thus, a gift to her of a share or proportion of the land or rents will be considered as inconsistent with her claim of her common law share.² So if the land is devised to a third person, and the mode of his enjoyment of the property, as directed in the will, is inconsistent with dower, she will be put to her election if she takes any benefit under the will. These are cases of necessary implication; but if, by any conceivable hypothesis, the dispositions in the will can be reconciled with the wife's common law rights, she will not be put to her election. In the cases mentioned, however, dower would be inconsistent with the terms of the will. In like manner, powers of leasing, of occupation, or of managing the land, conferred on trustees or others, are also held to be inconsistent with a right of dower, which implies an enjoyment by metes and bounds.³

Where a gift is given to the wife in lieu of dower and the devise of the dowry lands determines, the heir takes then discharged of the dower.⁴ But it has been decided that she can claim a share of the personalty if its bequest is void; *semble*, also, if the devise of the realty is void and not merely determinable.

By the 3 and 4 Wm. 4, c. 105, a widow's dower is placed wholly at the mercy of the husband. Yet it is not defeated in England even now by a mere bequest,

¹ Dowson v. Bell, 1 Keen, 761.

² Reynolds v. Torin, 1 Russ. 129.

³ Roadley v. Dixon, 3 Russ. 192.

⁴ See Pickering v. Lord Stamford, 3 Ves. 337.

nor by a devise to her of land not liable to her dower. By the English dower act referred to,¹ the widow's dower is subject to all the dispositions in the will, and a devise of the land to another, or of any interest in the land to the widow, absolutely defeats her claim "unless a contrary intention appears" by the will. A devise to the widow of land not liable to dower would seem to preclude her claim to dower, by the terms of the statute. Yet, the contrary seems to have been decided in England. A gift of personalty to the widow does not come within the terms of the act. It gives the widow dower of trust estates as a sort of set-off to the injury done to her dower rights by the general scope of the enactment. In the American States the same rules as to dower apply as in England prior to the act mentioned. Here, therefore, a widow is not entitled to dower of trust estates, unless a local statute provides to the contrary.

Although parol evidence, as a rule, is not admissible to raise a case of election, yet in some instances such evidence has been admitted in America.² Cases of this sort, however, are infirm as general authorities, especially with respect to the reception of parol evidence, the rules for admitting which are daily more and more approximating a scientific shape in America. There has been considerable positive legislation in the various States on the subject of dower.³

¹ §§ 4, 5.

² *Bailey v. Duncan*, 4 Mon. 265, 266.

³ See 1 Jarm. 397, note by Judge Perkins.

CHAPTER XIX.

ELECTION.

The doctrine of election is founded on the principle that a person cannot take a benefit under a will or deed without being bound or estopped by the contents of the whole instrument. The doctrine is acted on in the American courts. Accordingly, if a testator deals with the property of one who is a beneficiary under the will, the beneficiary must either waive the benefit given to him by the will, or else acquiesce in the disposition made of his property by the testator. If he prefers retaining his own property, then equity will appropriate the interest given him in the will, in order to make compensation to the other party.¹

The statements in the will are an estoppel on all the beneficiaries. Therefore, it is not competent for them to show that a child has not received the advancements mentioned in the will, with any view to enlarge the provision made for such child by the will.²

A case of election will not be raised, if it be possible to construe all the provisions in the will to relate to the testator's own property or powers.³ But, any interest, however slight, such as a small annuity given to the heir or next of kin, may put them to their election, in case other provisions of the will are void.⁴ It is not

¹ *Havens v. Sackett*, 15 N. Y. (1 Smith), 365.

² *Painter v. Painter*, 18 Ohio, 247.

³ *Havens v. Sackett*, 15 N. Y. (1 Smith), 365.

⁴ *Arnold v. Gilbert*, 3 Sand. Ch. 531.

material to determine whether the testator was aware that he was raising a case of election or not, provided he had testamentary capacity.

A person electing against a will loses only what is sufficient to compensate the other object of the testator's bounty. The object of the court is not forfeiture, but compensation, to the disappointed beneficiary. The doctrine is, therefore, not very strictly enforced, and a beneficiary may retain his gift, and yet derive property from another who elected against the will. The doctrine, too, does not apply to creditors.¹

Parol evidence is not admissible to prove a case of election. It must, if available, appear on the face of the will² in clear terms. Therefore, a mere general devise of land, even if the testator had no such property, never raises a case of election.³ If there is a reference to lands at a particular locality, of course, the case is different. Where wills of realty speak only from the death of the testator, a general devise of land is still less potent to raise a case of election than where wills of land speak from their date. For, as the testator may buy lands after making his will, and these may pass by it, it is not clear that he intends to convey any property not his own. But this is the assumption of fact on which the doctrine of election rests.

If a foreign heir seeks part of the personalty, he will get it by the testator's domiciliary law, without incurring any peculiar obligation which his own law would impose on him as heir.⁴ Conversely, if he seeks to shift any special charge from his land to the general

¹ *Kidney v. Coussmaker*, 12 Ves. 136.

² *Story Eq. Jur.* § 1092, and note; see *Hapgood v. Houghton*, 22 Pick. 480; *supra*, Part I, 171.

³ *Doe d. Chichester*, 4 Dow, 76.

⁴ *Balfour v. Scott*, cited in 5 Ves. 750; 2 Ves. & B. 131.

personalty, he will fail in such claim.¹ The reasoning of Sir Wm. Grant as to these two different questions, however, is not satisfactory. All the liabilities of the general personalty of the deceased, it would seem, should, in principle, be admitted by the administering court. The general personalty is as much the property of the creditors of the deceased as it is of his next of kin. The question whether the land is in or out of the jurisdiction ought not be deemed to affect this liability of the personalty in the court of administration. However, the cases cited would probably be followed in America.

In *Hunter v. Bryant*,² a devise to testator's wife was, under the particular circumstances of the will, taken to be in satisfaction of a bond given to her before marriage, but subject to her election between the bond and the devise. This privilege of electing was also held to have passed to her devisee.

A daughter, owning a lot subject to her mother's life estate in a third of it, directed her executors to lease all her real estate, and pay annuities to her mother and others out of the rents. It was held that the mother was not compelled to elect, but took the annuity in addition to her own estate, though it might be otherwise, if the charge was on the whole lot specifically.³

In *Pinckney v. Pinckney*,⁴ it was held that a legacy to one of the next of kin, "in lieu of all rights she might have in the real or personal estate" of the testator, did not require the legatee to elect between the legacy and her share as next of kin, of a portion of

¹ *Drummond v. Drummond*, cited in 2 Ves. & B. 132.

² 2 Wheat. 32, reversing 3 Wash. C. Ct. 348,

³ *Harrington v. Hughes*, 1 Paige, 569.

⁴ 1 Bradf. 269.

the estate not disposed of by the will, and that she took both. It thus appears that a testator cannot bar his next of kin from a share of his estate by mere words of negation. Consequently, as regards rules of construction, the next of kin are just as much favored as the heir. Both have vested rights which the court will not divest without express words or necessary implication.

The court will elect for an infant. An adult may elect by parol, or by any matter *in pais*. If, however, the person bound by a covenant to convert money into land, or conversely, becomes also entitled to the benefit of the covenant, the property is then "at home," and retains unconverted.¹

In Van Dyke's App.² indeed, the personal estate was given to the daughters, and the real to the sons, but the will was not executed so as to pass real estate. Yet the daughters were compelled to elect. The decision has not much lateral support in the analogous cases, but it has in principle.

In most of the States, the testator must be competent to dispose by will of the property in question, and the will must have been legally executed before a case of election arises, except that a testator having capacity to bequeath personalty, but not realty, may yet raise a case of election as to realty by giving his bequest expressly *on condition* that the legatee acquiesce in the transfer of the realty. Unless the legatee complies with this injunction, he forfeits the whole legacy, and not merely a sufficient part to compensate the disappointed devisee, as happens under a case of election proper. Unless the medium of a condition is resorted to, the beneficiary under the will may, in the case put, keep

¹ Chichester v. Bickerstaff, 2 Vern. 295.

² 60 Penn. St. 480.

the testamentary gift, and yet refuse to part with any property of his own which the testator had not capacity to devise, or did not dispose of by a will appropriately executed. A married woman who executes a power, and tries to put the appointee to an election, by devising away property from him which she is incapacitated from doing by coverture, will fail to raise any case for election. The appointee can retain the gift appointed, and yet refuse to part with his own property.¹ *Semble*, the married woman could not even effectuate her design of an election by imposing any condition on the appointee. Such a condition would be *ultra vires*, and void.

Indeed, the substitution of a condition for an election seems to be altogether technical and contrary to principle. Either the beneficiary ought to be put to his election whether the will was properly executed by a competent person or not, or else a condition ought not to be deemed to overcome the inherent invalidity of the disposition. However, the distinction seems to be well settled by authority.² Any change in the law ought to be perhaps to deem every case of election as one of implied condition. The margin for elections is much narrowed by the statutes which have assimilated the law of wills of realty to that of personalty, and have made realty assets for the payment of debts.³

¹ *Rich v. Cockell*, 9 Ves. 370.

² *Boughton v. Boughton*, 2 Ves. Sen. 12.

³ As to election, see further, *Parsons v. Snook*, 40 Barb. 144; *Sullivan v. Mara*, 43 Barb. 523; *Tobias v. Ketchum*, 32 N. Y. 319; *Havens v. Sackett*, 15 N. Y. 365; *O'Riley v. Nicholson*, 45 Mo. 160; *Storring v. Borren*, 55 Barb. N. Y. 595.

CHAPTER XX.

VESTING.

§ 1. *Interests in land.*

A vested remainder, according to Fearn's definition, is a remainder that has a present capacity to take effect in possession, if all prior limitations determined. He explains the nature of a vested interest thoroughly and completely, although his reasoning with respect to a limitation to a trustee to preserve contingent remainders is entirely inconsistent with his own definition; inasmuch as a trustee to preserve &c. has no capacity to take the estate, unless the previous limitation determines on a contingency not certain of ever happening. The word "vested" in a will is sometimes construed as denoting possession of property already vested in interest,¹ and a reference to estates "given," vested, or to which the donees were "entitled" may, owing to the context, refer only to estates vesting in possession at the period referred to.² In like manner sums bequeathed to children, not to "vest" until majority, vest at once in interest, though not in possession, until majority.³

In a doubtful case an estate will be more readily construed to be vested than contingent.⁴ For the law

¹ *Berkeley v. Swinburne*, 16 Sim. 275.

² *Kane v. Astor*, 9 N. Y. (5 Seld.) 113.

³ *Thompson v. Thompson*, 28 Barb. 432.

⁴ *Dingley v. Dingley*, 5 Mass. 539; 2 Pick. 469; 4 Pick. 198; 21 Pick. 314; *Eldridge v. Eldridge*, 9 Cush. 516.

favours the vesting of interests.¹ Therefore, remainders and future estates that relate to the determination of prior ones are vested, if there is a present capacity in the ulterior donee to take were there no preceding interest. The phrase "in default of issue," too, means a failure of issue, and does not render a remainder thereon contingent on there never being any such issue or on any such estate not failing by lapse.² Even certain apparent contingencies are not construed to be really such. Thus on a devise to a widow for life, and if she marry again, over, the remainder takes effect, whether she marries or not. The form of such limitations is unimportant, if the intention be to have the remainder vested.

*Though a future devise be contingent in terms, yet, if there is a preceding devise covering the whole period before the contingency, the ulterior devisee takes a vested interest, the prior devise being construed as an exception, and not a condition, to his taking. Thus, under a devise of lands to trustees, until A. shall attain twenty-one, and if or when he shall attain that age then to him in fee, here A. takes a vested interest.³ *A fortiori* will the rule prevail, if the prior interest, as in the case cited, is for the benefit of the devisee.

And where a devise standing alone would be contingent, as to A. if he should attain twenty-one, yet, if there is a devise over, if he die under age, or on any other event, this gives him a vested interest at once, as the devise over shows that he was to take an indefeasible interest, if he attained age.⁴

¹ 4 Kent, 5th ed. 202 *et seq.*; *Dingley v. Dingley*, 5 Mass. 535; see *Winslow v. Goodwin*, 7 Met. 362.

² *Doe v. Dacre*, 1 Bros. & Pull. 250; *Bates v. Webb*, 8 Mass. 458; *Ferson v. Dodge*, 23 Pick. 287.

³ *Edward v. Symonds*, 6 Taunt. 213.

⁴ *Peyton v. Bury*, 2 P. W. 626.

If there be a devise to trustees in trust to convey, yet, the rule in *Peyton v. Bury*¹ will be adopted, although executory limitations are generally to be construed with much care. The context in all these cases is to be studied with attention, and any express declaration or condition as to the period of vesting will, of course, put all implied rules to silence.² A devise after payment of debts, however, does not postpone the vesting.³

But the period of possession or of a division (when such is to be made) is often coincident with the period of vesting, which it postpones.⁴ So, if the testator erroneously supposes that he has no power to dispose of the estate, except on the contingency plainly indicated in his will, his error of law or fact does not prevent the devise from being contingent.

A contingency affecting a particular estate will, of course, sometimes affect the whole series of remainders. But if these are substantive gifts, or if there is any point of substantial contrast between the preceding estate and the ulterior ones, these will not be deemed affected with the contingent nature of the previous estate.⁵ Nor will a vested estate be divested, unless all the conditions and contingencies affecting the ulterior divesting estate are fulfilled.⁶

The courts in the United States incline to the vesting both of devises and bequests.⁷ Yet a remainder will not be deemed vested during the currency of the particular estate, if the testator has disposed of the in-

¹ 2 P. Wms. 626.

² *Glanvil v. Glanvil*, 2 Mer. 38.

³ *Barnardiston v. Carter*, 1 P. W. 505.

⁴ See 4 Kent, 5th ed. 206.

⁵ *Lethiellier v. Tracy*, 3 Atk. 774.

⁶ *Hornes v. Herring*, 1 McCle. & You. 295.

⁷ *Kane v. Aston*, 5 Sandf. 467.

terest or dividends only for a particular purpose,¹ The general rule is, that remainders (if not contingent in their own nature), vest in interest at the same time as the first estate vests in possession. A gift to persons living at a certain period is, however, contingent as to the persons who will be beneficiaries.² But a substitutional gift to children in place of their parents dying before the period of distribution is vested,³ and a bequest to a person when he should attain a specified age, with a direction to apply the interest, meantime, to his education is vested.⁴ In *Converse v. Kellogg*,⁵ it was held that under a devise of "all the residue of my estate to my children," naming them, "and to the descendants of such of them as shall have died in equal portions, but not to be divided until ten years after the death of my wife," the children or their descendants, took present vested interests on the death of the testator.

§ 2. *Future vested gifts of land.*

As the courts incline to regarding limitations as vested⁶ and conditions as subsequent if the context is at all doubtful, therefore, a devise to A. *when*, (but not if), he attains a given age, and, meantime, to B., gives to A. a vested estate, and to B. a term.⁷ Even if there is a limitation over in case A. die under the specified age, his interest, nevertheless, will be vested. The courts will deem an interest in land vested where they would hold a similar gift of personalty contingent by reason of the whole of the interest not being given meantime.⁸

¹ *Drake v. Pell*, 3 Edw. 251.

² *Phelps v. Phelps*, 28 Barb. 121.

³ *Beekman v. Schermerhorn*, 3 Sandf. Ch. 181.

⁴ *Burrill v. Sheil*, 2 Barb. 457.

⁵ 7 Barb. 590.

⁶ *Ferson v. Dodge*, 23 Pick. 287.

⁷ *Boraston's Case*, 3 Co. 21, a, b; *Winslow v. Goodwin*, 7 Met. 363.

⁸ *James v. Lord Wynford*, 1 Sm. & G. 40.

Sometimes, indeed, if there is no preceding interest, or if the word "if" and not "when" be used, the devise will be deemed contingent, unless there is a gift over, in the event of the donee dying under the specified age. Under such a context he will take a vested interest, unless the condition is imported into the description of him in the will, as if the devise be to such of the children of A. as shall attain twenty-one.

If a precedent estate determines by lapse, the ulterior vested interest then takes effect in possession.¹ Boraston's case,² has been followed in various decisions in the United States.³ But if there is a devise over to others of the same class, in case of the first devisee dying under the prescribed age, his estate will be deemed contingent.⁴ This seems to be the more natural construction.

In *Zeller v. Eckert*,⁵ A. testator devised to his widow until his son should attain fifteen. The widow was held entitled to hold for fifteen years, even though the son died previously.⁶ In *Farmers' Bank v. Hoof*,⁷ A. devised to his wife during widowhood, but in case she should marry again, then to his daughter and her heirs. The daughter's remainder in fee was held to be vested.⁸

As to vested charges or portions, see *Fuller v.*

¹ See *Gotch v. Foster*, 5 Law Rep. Eq. 311.

² 3 Co. Rep. 19.

³ *Hodgson v. Gemmil*, 5 Rawle, 99; *Cowdin v. Perry*, 11 Pick. 503. 508.

⁴ *Ib.*

⁵ Supreme Ct. 1846, 4 How. 289.

⁶ See further as to vesting, *Walls v. Garrison*, 33 Ga. 341; *Roberts' Appeal*, 59 Pa. St. 70; *McGill's Appeal*, 61 Pa. St. 46; *Kerr v. Bosler*, 62 Pa. St. 183; *Abbott's United States Digest*, Vol. I, 461.

⁷ *Moon v. Stone*, 19 Gratt. (Va.) 130; *Wiggins v. Blount*, 33 Ga. 409; *Buzby's Appeal*, 61 Pa. St. 111; *Pike v. Stephenson*, 99 Mass. 188.

⁸ See *Lovett v. Gillender*, 35 N. Y. 617; *Carmichael v. Carmichael*, 4 Keyes, 346; *Roome v. Phillips*, 24 N. Y. 463.

Winthrop;¹ and as to vested charges, see further *Burrell v. Steill*.²

A vested interest is assignable, devisable, and transmissible on intestacy. An estate vests under a devise before entry. But, of course, a devisee may disclaim.³ To give the devise effect as against the heir, the New York statutes require the will to be proved and recorded in the surrogate's office within four years after the testator's death.⁴ As to the admission of wills of personality in the State of New York, see also the Revised Statutes.⁵

§ 3. *Vesting of legacies charged on land.*

Legacies charged on land, if not payable until a future date, do not vest prior to that period, even though interest be given in the meantime,⁶ unless the postponement is for the convenience of the estate, as, where there is a preceding life interest.⁷ In such a case the legacy does not sink for the benefit of the inheritance, but is vested and transmissible.

A legacy payable out of both realty and personality is governed by the rules relating to personality, so far as the personal estate extends.⁸ Land directed to be sold and terms of years are for this purpose considered to be personality. But the assets will not be marshaled

¹ 3 Allen, 51; *Lane v. Lane*, 8 Allen, 350.

² 2 Barb. Sup. Ct. 457; *Harris v. Fly*, 7 Paige, 421; *Conklin v. Moore*, 2 Bradf. 179; *Sweet v. Chase*, 2 N. Y. 73.

³ See *Townson v. Tickell*, 3 B. & Ald. 31.

⁴ See Rev. Stat. N. Y. Vol. II, 57-59, as to personal estate.

⁵ Vol. II, 60, 62; *Id.* 66-68, and the Act of 20th April, 1830; 4 Kent Com. 534.

⁶ *Pearce v. Loman*, 3 Ves. 135.

⁷ *Remnant v. Hood*, 2 De G. F. & J. 410.

⁸ *Prowse v. Abingdon*, 1 Atk. 482.

for the legatee.¹ However, the rule in *Pearce v. Lowman* would probably not be followed in the United States.

A legacy to one when he attains age is often construed as vested, though no interest is payable meantime,² especially if there is a limitation over, in case of lapse or some other contingency.³ Where a sum is to be raised within a certain period, it is vested at once, the period specified being only the major limit of the time for raising the sum, unless the testator's interest is reversionary.⁴

Bequests are governed by the same general principles, as to vesting, as devises, although limitations of the two kinds of property are not always construed in the same way.⁵ Pecuniary legacies charged on land, however, are construed as if dispositions of realty.

A legacy to a person *in esse* simply is vested on the death of the testator. A legacy to him at a future date, as when he attains age, is not vested until that period, even though interest meantime be given for his maintenance, unless the future date relates to the estate, as if it be after the determination of a prior particular estate.⁶ The distinction is obvious; in the one case the contingency relates to the person of the donee; in the other, to the subject-matter of the gift. If interest is given meantime, however, it will, in the United States, be held to be vested.⁷

If the legacy is payable out of a future sale of land,

¹ *Pearce v. Lowman*, 3 Ves. 135.

² *Caldwell v. Kinkad*, 1 B. Mon. 231; *Lister v. Bradley*, 1 Hare, 10.

³ *Lowther v. Condon*, 2 Atk. 130.

⁴ See *Bowker v. Bowker*, 2 Cush. 219.

⁵ See *Ferson v. Dodge*, 23 Pick. 287.

⁶ *Birdsall v. Hewett*, 1 Paige, 32; *Childs v. Russell*, 11 Met. 16.

⁷ *Gifford v. Thorn*, 1 Stockt. N. J. 702.

to be made on the death or marriage of the devisee, the legacy is vested, the postponement being for the convenience of the estate.¹

In *Bowker v. Bowker*,² after a devise upon condition that the devisee pay \$100 annually for seven years to his brother, the brother died before the seven years elapsed, yet his executors were held entitled to receive the annuity for the rest of the seven years.

§ 4. *Vesting of personal legacies.*

In the civil law, the term vested means unconditional and transmissible, while non-transmissible or conditional interests were termed contingent. But, in our law, a contingent interest is not always intransmissible. The term vested, with us, means a certain interest in a certain person. The term contingent, on the other hand, denotes that either the person or event on which the gift depends is uncertain ever to exist. The former class of interests is saleable, although the actual possession of the property may be deferred. When the donee is uncertain, however, it is clear that the interest is unsaleable. If it is limited at a remote period, therefore, it may keep property out of commerce and be a perpetuity, unless it is a remainder at common law, and, as such, destructible by the preceding tenant of a vested freehold.

It is generally considered that if a legacy is given to A. at twenty-one, or to be paid to A. at twenty-one, it does not vest till payable. But, if given to A. to be paid to him at twenty-one, it is vested at once. This distinction has been followed in the United States,³ and

¹ *Sharpsteen v. Tillon*, 3 Cow. 651.

² 9 Cush. 519.

³ *Marsh v. Wheeler*, 2 Edw. Ch. 156; *Kihler v. Whitman*, 2 Har. 401.

so much importance has been attached to the insertion of the word "payable," that a legacy to one "if he shall arrive at the age of twenty-one years, then to be paid over to him by my executor" is not a contingent, but a vested legacy.¹

It is often, indeed, very difficult to determine whether the futurity is of the substance of the gift or merely of the time of payment. Division at a future period, however, does not, more than payment, at such a time suspend the vesting.

But, if the payment or distribution depends on a contingency, as marriage with consent, this will render the legacy contingent,² and, in case the legatee dies without fulfilment of the condition, the legacy is not transmitted. A gift of interest, unless it be of a portion of such proceeds for maintenance, is almost conclusive evidence that an immediate vesting was intended by the testator. But, a direction that the interest shall be added to the principal until the legatee attains age does not suspend the vesting.³

A bequest to A. "upon," or "at," or "when," or "if" he attain a given age, or on his marriage, is contingent. A like rule applies to a gift to a class.⁴ The question in such cases usually is whether the gift and time of payment are distinct. If they are, then, as each clause in a will is to have some operation, the gift is deemed to be vested at once⁵—due at once and payable at a future time—especially if interest is given meantime.⁶

¹ *Furness v. Fox*, 1 Cush. 134; see *Eldridge v. Eldridge*, 9 Cush. 516.

² *Atkins v. Hiccocks*, 1 Atk. 500.

³ *Stretch v. Watkins*, 1 Madd. 253.

⁴ *Leake v. Robinson*, 2 Mer. 363.

⁵ *Paterson v. Ellis*, 11 Wend. 259; *Turk, ex parte*, 1 Bradf. 154.

⁶ 6 Ves. 249; *Van Wyck v. Bloodgood*, 1 Bradf. 154.

In *Southern v. Wallaston*,¹ however, the gift was to such of the children of A. as should attain twenty-five, with interest meantime, and the bequests were held to be contingent. For, accumulation is only one ground for presuming that the legacy to which it relates is vested; and this implication may be outweighed by the context.²

The period of actual payment will confine the vesting of a bequest made to the children of A. "when the youngest child attains twenty-one," to such of the children as shall attain that age.³ They or their representatives, and not any dying under twenty-one, will participate. This case of *Leeming v. Sherratt* seems weak in point of principle. The youngest child was probably fixed upon by the testator merely in order to prevent a premature division, and not as impliedly imposing a condition on the vesting or transmissibility of any of the children's shares. Yet, the decision has been followed by several others, and the case of *Cooper v. Cooper*⁴ is not any real authority to the contrary, as the children in that case were enumerated by name. Requiring a legatee to prove his identity within a specified time in no way affects the vesting.⁵ Neither does the legacy become contingent because it cannot vest in possession during the life of the legatee.⁶

A gift of interest subject to a charge does not prevent the principal from vesting;⁷ *aliter*, if the gift of interest is itself contingent or dependent as to its quan-

¹ 16 B. 166.

² *Lyman v. Parsons*, 28 Barb. 564.

³ *Hawkins on Wills*, 233; *Leeming v. Sherratt*, 2 Hare, 14.

⁴ 29 B. 229.

⁵ *Ennis v. Penty*, 3 Bradf. 383.

⁶ *Sweet v. Chase*, 2 N. Y. 73.

⁷ *Jones v. McIlwain*, 1 Russ. 220.

tity on the discretion of a trustee,¹ unless there is a trust for its accumulation.

As to vested legacies see further Bowman's Appeal.²

The courts lean much to the vesting of residuary bequests in order to prevent intestacy. Yet, a residuary bequest to the children, or to such children as shall attain twenty-one, is obviously contingent. A contingent interest, however, is transmissible, when the contingency does not relate to the person of the donee, but to some other person, or thing, or to the subject matter of the gift.³

A legacy to a church, if C. continues to be its pastor for seven years, but if not, to C. with interest, is given on a condition precedent, and vests in C. on his retiring from the church with consent of the congregation.⁴ But, a devise to children, "if they should come of age," gives them no right of immediate possession, and the property meantime goes to the heir.⁵ A condition, however, is often virtually a mere specification of the time when the interest shall vest in possession.⁶ In *Brownson v. Gifford*⁷ it was held that a devise to a married woman, with a provision that if her husband advanced any claim against the testator's estate, the gift should be void, was merely a condition subsequent.

Wills of personalty, it is to be remembered, are construed according to the rules of the civil law. But wills of

¹ *Palsford v. Hunter*, 3 Rev. C. C. 416.

² 34 Penn. St. 19; *Barker v. Woods*, 1 Sand. Ch. 129; *Pinney v. Fancher*, 3 Bradf. 198; *ex parte Turk*, 1 Bradf. 110; *Adams v. Beekman*, 1 Paige, 631.

³ *Wilson v. Bayley*, 3 B. P. C. Toml. ed. 135.

⁴ *Caw v. Robertson*, 5 N. Y. (1 Seld.) 125.

⁵ *Jackson v. Winnie*, 7 Wend. 47.

⁶ *Crosby v. Wendell*, 6 Paige, 548.

⁷ 8 How. Pr. 92.

realty are interpreted more in conformity with the common law. As to contingent bequests of personalty see further *Nash v. Culter*.¹ If the legacies be given to a class, however, it is thought that the American courts incline to postpone the period of vesting until the time appointed for payment, especially if they are charged on land.²

¹ 16 Pick. 491; *Boone v. Dyke's Legatees*, 3 Mon. 529; *Emerson v. Culter*, 14 Pick. 108; *Bateman v. Gray*, Law Rep. 6 Eq. 215; *Furness v. Fox*, 1 Cush. 134; *Trustees of Smith's Charities v. Northampton*, 10 Allen, 498.

² See *Hawkins v. Everett*, 5 Jones, Eq. 42; 2 Redfield, 243; *Cooper v. Cooper*, 7. Jur. N. S. 178; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Wessenger v. Hunt*, 9 Rich. Eq. 459.

CHAPTER XXI.

CONDITIONS.

§ 1. *Their nature and incidents.*

Rules of law are often confounded with rules of construction. Yet there is a patent difference between them. In deeds some rules of construction are rules of law. The rule in Shelley's case, for instance, is a rule of law in a deed; so is the rule that, under a limitation to one and his heirs, the donee takes a fee simple, or under a limitation to him and the heirs of his body, an estate tail. These rules of construction are so cogent that any clause to the contrary is void. Therefore, a condition that a tenant in fee shall not alien, or that a tenant in tail shall not disentail the land, is void. This rule applies whether the limitation be in a deed or a will. The legal incidents of estates are of their very essence, and cannot be eliminated from the gifts. Such a restriction would amount to saying, you shall and you shall not have the property. But, in wills there is always the preliminary question of construction. A testator cannot, indeed, as to the estate limited, give absolute property without certain consequences attached thereto, as liability to debts, dower, curtesy, &c. But the question under a will must first be determined, whether the absolute property is given or not; and, if it is fettered with certain restrictions inconsistent with an absolute interest, the courts may cut down the absolute gift, instead of eliminating the incongruous inci-

dents, as would be done if the document were a deed. Rules of law, then, are applicable to wills. But their application depends on rules of construction, which, unlike the case of a deed, are as varied as the sentiments expressed by different testators.

A condition was a common-law mode of defeating, but not for transferring, an estate. For instance, if land was given to A. and his heirs, on condition that A. should pay a yearly rent to the grantor, or attend at the county court, with power of re-entry to the grantor on breach of the condition, A.'s estate would be defeated by such entry for a breach of the condition. Rents, though not conditions, be it remembered, can be reserved on alienations in fee even since the statute *Quia emptores*. The only effect of that act is, that no tenant in fee can make himself a lord of a manor, or reserve any tenure to himself from his grantee in fee. But, as a rent may be given in fee to a stranger, so may it be reserved by one who has parted with his reversion. Yet, he cannot by reserving a clause of re-entry, resume his old estate on breach of a condition for payment of the rent.

Neither can a condition on a deed transfer an estate. It is only the grantor or his heir who can take advantage of it. Therefore, at common law, on a grant in fee to A. and his heirs, on condition that if B. returned from Rome, A.'s estate should pass to him or to C., this condition is void. But, in a will, this condition is good. The ulterior estate is thus a shifting use or executory devise. It is no matter how a condition is worded in a will, effect will be sought to be given to it, in this or some other way, if the condition be itself legal. Accordingly, conditions subsequent in wills are usually construed to be conditional limitations.

No precise form of words being necessary to con-

stitute¹ a condition² or, indeed, any limitation in a will, a devise to A., "he paying \$1,000 within a month after my decease," imports a condition. Only the grantor or heir could enter for a condition broken at common law, and when an entry was thus made, it defeated all *puisne* grants by the tenant. Therefore, a release of a condition for once operated to destroy it wholly, else, on a second breach without license, the grantor entering would defeat the estate to the creation of which he had assented by his license. In a will there may be a limitation over on breach of a condition. But such a limitation would be void in a deed operating at common law and not by way of use. When contained in an instrument of the latter description, it is termed a shifting use; in a will it is called an executory devise or conditional limitation. Conditions of re-entry in deeds are very useful, as they enable the grantor to defeat the conveyance wholly, and not merely to have a receiver appointed. Accordingly, such conditions are very common in leases.

If a forfeiture of a legacy is inflicted upon the legatee, if he do not comply with the testator's injunctions, yet, if the legacy be not given over, the threat will be deemed to be *in terrorem* only, and not as concluding the rights of the parties.³ It is strange that the doctrine that a condition is merely *in terrorem* and void was ever adopted by the courts. Lord Cranworth in Dickson's trust⁴ said that no condition should be deemed *in terrorem*. But, this dictum is opposed to numerous decided cases.

¹ Part of this chapter has already been published in the Albany Law Journal, Vol. V, p. 145.

² See *Stark v. Smiley*, 25 Maine, 201; 4 Kent, 5 ed. 124; 1 Jarm. 798, note.

³ *Pray v. Belt*, 1 Pet. 670.

⁴ 1 Sim. N. S. 37.

The *in terrorem* doctrine is daily loosing ground. In *Haydyn v. Stoughton*¹ an estate was devised on condition that a school house should be built on the land. The condition was held valid, and the residuary devisee (not the heir at law), was allowed to enter for the breach, twenty years having elapsed from the entry of the devisee.

There is no objection to a devise to one, "if he be a citizen of the United States, and as such capable of holding land at the time of testator's death," but, if not, that the lands be sold and the proceeds given to him.² And yet this condition seems intended to contravene the rule of law forbidding aliens to hold land.

When a condition is annexed to a preceding estate that never arises, a remainder, nevertheless, may take effect. The previous estate in such cases is a limitation, but not itself a condition, in respect to the ulterior interest.³

On a devise to A. for life, remainder to B. in fee, upon condition that, if the rents were not sufficient for the support of A., the deficiency should be supplied by B., the Supreme Court of Massachusetts held that there was no trust created for A., but only a condition, of which the grantor's heir could take advantage.⁴ This decision, with all respect be it said, seems to be worthy of the days of *Perrin v. Blake*.⁵

In *Moore v. Moore*,⁶ there was a clause in a will revoking a devise, on account of the intemperance of the devisee, and directing that unless he should reform, the

¹ 5 Pick. 528.

² Supreme Ct. 1835, *Beard v. Rowan*, 9 Pet. 301; affirming 1 McLean, 135.

³ *Norris v. Beyea*, 13 N. W. (3 Kern.) 273.

⁴ *Temple v. Nilson*, 4 Met. 568.

⁵ 4 Burr. 2579.

⁶ 47 Barb. 257.

property should be held in trust for three years, to give him time for reformation. The condition was held void, as attempting to create an illegal trust, as suspending the power of alienation illegally, and for uncertainty. The forfeiture being thus held void, the devise took effect simply.

If the beneficiary accept the gift, he is bound by any condition attached thereto.¹ But conditions in wills can only operate by way of election.²

As to conditions, see further *Harris v. Hearne*.³

§ 2. *Classification of conditions.*

Conditions are either express or implied, precedent or subsequent, real or personal, general or special.⁴ Conditions in deeds are also distinguished from limitations in abridging the estate, and from covenants, which only give a claim to damages, and not to an annulling of the grant. But in a will, limitations (for there can be no covenants) and other directions are virtually conditions. The court cannot construe them as covenants, or as giving any claim (except in a case of election), to damages, although a claim in a contract will be more readily construed as a covenant, which may be apportioned, than as a condition. But valid conditions in wills are virtually trusts, and will be as such specifically enforced in equity.

Conditions are most usually classed only as precedent or subsequent.⁵ They either relate to the acquisition of an estate or to its retention. Thus, a devise to A., if

¹ *Runnels v. Runnels*, 27 Texas, 515.

² *Ib.*

³ 1 Winst. Eq. 92; *Gridley v. Gridley*, 24 N. Y. 130.

⁴ Litt, § 325, 328.

⁵ See *Fox v. Phelps*, 17 Wend. 393.

he live to a certain age, and pay to B. a certain sum, imports conditions precedent.¹ If such a condition becomes² impossible, the estate will never vest. It is sometimes difficult to determine whether a condition is precedent or subsequent, but if it is subsequent and impossible, then, the former estate becomes indefeasible.³ As the immediate freehold could not at common law be limited on a contingency, this is perhaps the reason why the courts incline to construe a condition as subsequent rather than as precedent. Yet a stranger cannot take an advantage of the breach of a condition subsequent in a devise.⁴

In *Taylor v. Mason*,⁵ the Supreme Court of the United States held that, if a void condition is precedent, the estate cannot take effect. This doctrine, too, is as old as the common law.

Any consideration exacted from the beneficiary, or any duty imposed on him, unless it is spread over a very unusual period of time, is a condition precedent. Sometimes a condition such as the dying of A. unmarried, is imposed on a limitation to B. In such a case, B.'s estate does not vest during the life of A., as the condition may be determined affirmatively or negatively any time during that period,⁶ and though suspended so long, the condition is precedent.* Yet, in *Woodcock v. Woodcock*,⁷ a devise in remainder to A. upon such equivalent as the executors might determine, was held to be subject only to a condition subsequent, as the execu-

¹ *Johnson v. Castle*, 5 Vin. Ab. 343, pl. 41; *Vanhorne v. Dorrance*, 2 Dall. 317.

² *Wells v. Smith*, 2 Edw. 78.

³ *Morrell v. Emery*, 10 Pick. 507.

⁴ Sup. Ct. 1852, *Webster v. Cooper*, 14 How. 488.

⁵ 9 Wend. 350.

⁶ *Randall v. Paine*, 1 B. C. C. 55.

⁷ Cro. El. 795.

tors would require time to deliberate in estimating what would be an equivalent consideration.

If the condition is at all capable of being construed as subsequent, it will be deemed to be such. Therefore, a condition to be performed at any time will usually be held to be a subsequent one,¹ as, for instance, a devise to A. to enable him to support B. In *Page v. Hayward*,² lands were devised to A. and B. in case they married a person named S. They married each a person of a different name, yet they were held to take vested interests, the condition being subsequent, and being capable of being performed, as their husbands might die, and they might then marry persons of the coveted name.

As a gift of a legacy, when distinct from the time of payment, implies that it is vested, so, if an interest is distinctly devised, and afterwards made subject to a condition, this implies that the condition is subsequent, as to A. for life, but if she marry without consent, then to B.³

Jarman⁴ infers from the cases that the presumption is in favor of a condition being deemed precedent where it relates, 1, to the raising of a gross sum out of land, and not to a devise of the land itself; 2, where a pecuniary legacy is given, and not a residue; 3, where the act may be performed before the enjoyment of the interest begins; 4, where the condition is capable of being immediately performed; but, 5, that if a certain time is fixed for the performance of the condition, this strengthens the argument in favor of its being subsequent.

A condition of the nature of a consideration is usually deemed precedent.⁵ A condition that the beneficiary shall cease to resort to public houses is a condition

¹ *Finley v. King*, 3 Peters, 376.

² 2 Salk. 570.

³ *Lloyd v. Branton*, 3 Mer. 108.

⁴ Vol. I, 804.

⁵ *Acherley v. Vernon, Willis*, 153.

precedent, and not void for uncertainty.¹ If the condition comprises various acts, all must be performed.² A requirement that the devisee should remain with the testator during his life is a condition precedent, and must be performed.³

It is often hard to determine whether a donee is bound to perform a condition within a reasonable time, or has his whole life to perform it. But, as a rule, the condition should be performed within a reasonable time.⁴ Any condition subsequent to an estate tail may be defeated by the tenant disentailing the land. Jarman⁵ inclines to think that, if the estate is given over, this limitation takes effect if a condition subsequent to a prior estate on which it is itself limited becomes impossible; in other words, he considers that the impossibility of performing a condition subsequent renders the prior estate indefeasible only if there is no limitation over. This opinion he entertains in analogy to the effect of conditions respecting marriage.

The American cases recognize the distinctions between conditions precedent and subsequent and those annexed to realty and to personalty. Accordingly, if an illegal precedent condition be attached to a devise, it will not vest.⁶ The courts, however, latterly incline to hold gifts in restraint of marriage or lawful cohabitation as valid, and the condition alone to be void.

If the condition is subsequent, and the property is given over on non-performance, this may divest the first estate, even if the condition becomes impossible.⁷ But

¹ See *West v. Moore*, 37 Miss. 114.

² *Moakley v. Riggs*, 19 Johns. 71, 72.

³ *Den v. Messenger*, 33 N. J. L. (4 Vr.) 499.

⁴ *Ross v. Tremaine*, 2 Met. 495.

⁵ Vol. I, 808.

⁶ 2 Greenl. Cruise, 16; see *Maddox v. Maddox*, 11 Gratt. 804.

⁷ *Graydon v. Picks*, 2 Atk. 16.

if the impossibility is owing to the act of the grantor, the condition is thereby avoided.¹

In *Taylor v. Mason*,² a condition that the devisee should take an oath that he would make no change in the property during his life was held, under the terms of the will, to be a condition subsequent and to be repugnant to the nature of the estate previously granted. It was therefore void.

§ 3. *Conditions in restraint of alienation.*

Conditions that are repugnant to the nature of a gift are absolutely void.³ There is, consequently, much ground for contending that any condition against alienation, where the condition is not attached to a reversion or other assignable interest, is void entirely, and not merely beyond the line of perpetuity, unless there is a limitation over. The nature of the condition is then reversed. For, it operates to assign instead of preventing the assignment of property.

A condition contrary to a plain rule of law is admittedly void. Therefore, if land be devised to A. in fee, but with a condition that he shall not alien or subject to debts, this condition is void.⁴ Even a condition not to alien by any mode not tortious and allowed by law is invalid. But a condition not to assign to a particular person or use as in⁵ mortmain is valid, for the same reason that a condition in partial restraint of contract is good, though a contract or condition in general restraint of future transfer or dealing is void.

¹ *United States v. Arredondo*, 6 Pet. U. S. 691, 745.

² 9 Wheat. 325.

³ *Stockton v. Turner*, 7 J. J. Marsh. 192.

⁴ *Hall v. Tufts*, 18 Pick. 455; *Newkirk v. Newkirk*, 2 Caines, 345; *Bramhill v. Ferris*, 4 Kern. (N. Y.) 44.

⁵ *McWilliams v. Nisley*, 2 Serg. & R. 513.

Conditions evidently come within the reason of the rule against perpetuities. Another reason why a restraint on the alienation of property is often deemed to be void, is, that it is incongruous and inconsistent with the gift itself. A condition, as such, operates, like a future use, to keep property out of the market, because the person who imposed the condition, or his heir, to whom the condition descends, can alone release it, and only to his grantee. There is no person always *in esse* beyond the perpetuity period who can launch the estate on the market, if the condition goes beyond the line of perpetuities. But, as a reversion is assignable, so is its accessory, or the right to the condition. Therefore, since the statute *Quia Emptores*, *semble*, no condition can be reserved on a grant in fee.

The authorities, however, differ respecting the validity of a condition against alienation annexed to an estate in fee. In *Rockford v. Hackman*,¹ the condition was held void. Kent considers² that the condition is good. Leases for years often contain such conditions, and there seems to be no valid reason, therefore, why leases for life should not be subjected to a similar restriction. But, of course, a condition not to assign, imposed on a tenant in fee is altogether repugnant to the estate, and also void as a perpetuity. A condition against alienation even within the line of perpetuity seems void if attached to a fee. Such conditions, when imposed on lessees, are assignable, because the reversions in which they inhere are assignable. But where there is no reversion, land is made inalienable in the case put. The condition, therefore, is, in point of principle, void. The case is different from a settlement of property in which

¹ 10 Eng. L. & Eq. 64.

² 4 Comm. 131.

the tenant for life can alien his own interest; but here is property sought to be rendered wholly inalienable for a certain period.

Such a restriction is inconsistent with the incidents of property,¹ even though it do not violate the rule against perpetuities. It is equivalent to an inalienable use or trust for a man, which is void both at law and in equity. Suspending the vesting of an interest is an entirely different thing. The particular tenants, in the latter case, may meantime dispose of their own interests, and even the contingent remainder-man, or *cestuy que use*, has a right which is assignable in equity (unless his interest is a bare possibility), even though he cannot give such a title to the fee or absolute property which a court of equity would force upon an unwilling purchaser. The case of *Piercè v. Win*,² therefore, is inconsistent with principle, and does not seem to derive much support from the later authorities.

In *Jackson v. Schutz*, however, it was held that a condition against alienation, without the consent of the grantor and offering him pre-emption, was valid in a grant of a fee.³

In *Simonds v. Simonds*,⁴ too, it was considered that a devise to one son in fee, on condition of his not aliening during the life of the other was valid. In *Timothy v. Camp*,⁵ a condition against alienation before the devisee was thirty-five years old, was held to be void. The same restriction in *Stewart v. Brady*,⁶ was held to be

¹ *Gleason v. Fayerweather*, 4 Gray, 348, 351; *Blackstone Bank v. Davis*, 21 Pick. 42; *McWilliams v. Nisly*, 2 Serg. & R. 507.

² 1 Vent. 321.

³ 7 Johns. 227; 18 Johns. 174; see *McWilliams v. Nisly*, 2 Serg. & R. 507.

⁴ 3 Met. 562.

⁵ 1 Phil. Eq. 61.

⁶ 3 Bush. 623.

valid. The former decision is alone in accordance with principle.¹

A devise to testator's children only in case they continued inhabitants of a certain place, was held, in *Newkirk v. Newkirk*,² to be void. Such a general restraint against a change of domicile, is doubtless unreasonable and void. It is to some extent equivalent to a condition against alienation, for if the devisees are required to live on a certain estate, they are not likely to sell it. Yet, such a qualification in the early reports seems to have been deemed good.

In *Gray v. Blanchard*,³ a condition that no window should be made in a certain wall was held valid, but a condition that the house should have no window, it was said by the court, would be void. The condition in this case seems to be repugnant to the nature of the grant, and, therefore, to be void.

Jarman thinks,⁴ that a condition imposed upon a devisee in fee, not to assign except to a particular person is valid. But such a condition is evidently void on principle, as it must operate in general restraint of trade in land, and be a kind of perpetuity. A condition against marrying any one but A. B. is doubtless void. In the case of *Pierce v. Win*,⁵ the condition was confined to a life in being, which the analogy of separate estate tended to support.

To take the converse case, Kent⁶ thinks that a condition not to assign to a particular person is unsound in principle. But the legality of a partial condition in restraint of trade, as of marriage, seems to be rather a consequence of freedom than an impediment to it, for a partial condition implies a consideration, or motive of some

¹ 3 Bush. 323.

² 8 Pick. 284.

³ 1 Vent. 321.

⁴ 2 Caines, 345.

⁵ Vol. I. 814.

⁶ 4 Com. 131.

reasonable kind. Therefore, if A. devises to B. on condition that he is not to sell to C., it is likely A. has some reasonable cause for disliking C. But A. would be an enemy of the human race if he forbade alienation to every one. The authority of Kent,¹ as of Jarman, however, is very likely to weigh with our courts quite as much as if it was a judicial decision. I, therefore, take the liberty of impugning boldly any of their positions that seem unsound. Were I even to prove my views conclusively, I could hardly detract from the general merits of these authors, particularly from the philosophical value of the commentaries.

A personal inalienable trust for men or unmarried females, is void by the law of England and the United States. But a life interest may be made to cease on alienation either voluntarily or by act of law².

Conditions are not favored at law, and still less in equity, because they operate as forfeitures. Yet, they tend to consolidate tenures and titles—an object which the common law endeavored to effect by various means, such as the presumption of a joint tenancy, with the right of accruer, and the rule in Shelley's case. Conditions, however, were of a divesting nature, and the law leans to the vesting of interests, and to their continuance when vested. Conditions, too, are not as flexible as uses, and, accordingly, those old levers of the common law are now in most cases construed in wills, as operating by way of contingent use.

§ 4. *Other void conditions.*

A condition against aliening the subject-matter of any absolute bequest or devise not a separate use, as a

¹ 4 Com. 131.

² See *Stevens v. James*, 4 Sim. 499; see *infra* c. 26, § 4.

general rule, is void, and so is any interest limited on breach of such void condition.¹ A condition against charging with debts any interest absolute or limited is also void. So is a condition that the property is not to be liable to be sequestered in case of bankruptcy.² Yet a disposition to A. until he becomes bankrupt, and then over, is valid.³

But neither a life estate nor an absolute one can be given without power of alienation, unless the gift is worded in the manner already described.

It has, indeed, been repeatedly held in the American States that general restraints on alienation are illegal if they extend beyond the line of perpetuity.⁴ Yet it seems that a trust for a person and his family may be made independent of the creditors of the head of the family. It has been decided in *Bramhall v. Ferris*⁵ that a similar provision might be deemed equally valid, even if there was no trustee. For, the intervention of such in a will seems never to be indispensable to the carrying out of the intention of the testator. Equity never wants a trustee.

In *Bramhall v. Ferris*,⁶ a testator directed his executor to pay the proceeds of his property to his son for life, in order to support his family. It was held that the son's creditors could only attach any surplus that existed beyond what was necessary for the support of the son and his family. This decision was made under the New York statutes. It is wholly at variance with the English rules as regards any interest given to the

¹ *Ross v. Ross*, 1 Jac. & W. 154.

² *Bramhall v. Ferris*, 4 Kern. N. Y. 44, 45.

³ *Brandon v. Robinson*, 18 Ves. 429.

⁴ *Newkirk v. Newkirk*, 2 Caines, 345; *Hawley v. Northampton*, 8 Mass. 3, 6.

⁵ 14 N. Y. 41; see *Clute v. Pool*, 8 Paige, 83.

⁶ 4 Kern. N. Y. 41.

son, as distinguished from the shares of his family. For, no trust for the separate use of a man free from the claims of his creditors can be established in English law.¹

But if the trustees have a discretion either to apply the property to the use of the beneficiary in question or to some other purpose, they may thus prevent the creditors from seizing it. This is equivalent to a gift to A. until bankruptcy, or to A. for life, and then, on his bankruptcy, to B.²

If there is a provision in the will prohibiting alienation, insolvency is a breach of that condition, as such an assignment is voluntary; but bankruptcy generally is an assignment *in invitum*, and will not be a breach of a condition against assignment,³ unless the condition is so worded as to include assignments by operation of law, or unless a person can by his own act become a bankrupt under the local law. A condition against assigning a life interest thus appears to be valid in some of the States, though a condition against incumbering it with debts is void, as creditors claim by the *post*, and not by the *per*; in other words, they claim by law, and not through the grantor.

Semble, though a gift be so worded as to be deemed either a loan or a gift, yet the creditors of the beneficiary can attach it.⁴

§ 5. *Conditions in restraint of marriage.*

Though all conditions in restraint of marriage were void by the civil law, yet our courts recognise the validity of such restrictions if they are not general.⁵ But, though these conditions are not illegal, they may still

¹ See 1 Jarm. 820, *et seq.*

² See *Dommett v. Bedford*, 3 Ves. 149.

³ See 1 Jarm. 828.

⁴ *Williams v. Jones*, 2 Swans. 620.

⁵ *Bullock v. Bennett*, 31 Eng. L. & Eq. 463.

be void, or, at least, ineffectual, unless there is a gift over on breach. If there is not such an ulterior disposition of the property in question, the condition is termed *in terrorem*, or a mere threat.¹ As a condition precedent, however, must be fulfilled, it is not construed *in terrorem*, even though there be no gift over, though even this point is still, perhaps, *sub judice*. These distinctions relate only to bequests of personalty. All conditions relating to devises of land are construed according to the common law, no matter whether the restriction relates to marriage or not.

By the civil law all conditions, whether precedent or subsequent, in restraint of marriage, were void.² But, in English law, a condition for consent to marriage is valid; so is a condition against marrying a particular person, or under a certain age. And a condition that a widow shall not marry again, has been held valid.³ Yet, this condition, being in general restraint of marriage, seems contrary to public policy, and would doubtless be held to be merely *in terrorem*, both in the United States and in England, at the present day.⁴ *Semble*, a condition of consent to marriage, though legal, is inoperative, unless there is a limitation over on breach of the conditions;⁵ and a residuary gift is not a limitation over within the meaning of this rule.

Conditions in restraint of marriage are thus construed in the American States, and if the gift is personalty, they will be held to be *in terrorem*, unless coupled with a limitation over in case of a breach.⁶

¹ 1 Story Eq. Jur. § 287.

² *Parsons v. Winslow*, 6 Mass. 169.

³ Amb. 209.

⁴ See *Binnerman v. Weaver*, 8 Md. 517.

⁵ See *Parsons v. Winslow*, *ut sup.*

⁶ *McIlvain v. Githin*, 3 Whart. 375; 2 Lead. Cas. in Eq. 390, 3rd Am. ed.

In the American States, however, a condition against the re-marriage of a widow is deemed legal.¹ This decision is supported by some old authorities; but, in point of principle, it is clearly a prohibition in general restraint of marriage, which is void in respect of all persons not widows. There is surely no reason why these should be thus restricted more than others.

Conditions precedent to marry with consent, will not be deemed *in terrorem*, even when there is no limitation over on breach, if the legatee takes a gift in the alternative of marrying without consent, or the marriage without consent is only one of two events on either of which the legatee will be entitled to the legacy, or if marriage with consent is confined to minority. Jarman's statement of the law on this point is to this effect² But, in reality, these are cases where there is a limitation on breach, but the same person is the alternative donee, or else the condition enters into the limitation so that it comes under the principle of the *in terrorem* doctrine as applied to conditions subsequent, and which regards a limitation over coupled with the condition as jointly constituting the terms of the gift over. At all events, a legacy given on marriage with consent, without any gift over, will not vest until marriage.

A legacy to a female, if she shall not cohabit with her husband, seems to be void on grounds of public policy. All conditions in restraint of marriage attached to legacies, however, though void by the civil law,³ are good as to land by the common law.⁴ Our

¹ 2 Redfield, 295; Hughes v. Boyd, 2 Sneed. 512; Holmes v. Field, 12 Ill. 424.

² Vol. I. 839.

³ Hoopes v. Dundas, 10 Barr, 75.

⁴ Commonwealth v. Stauffer, 10 Barr, 350.

present law is thus somewhat heterogeneous, but is, on the whole, sensible.

A condition against celibacy is valid. Thus, in *Cooper v. Remsen*,¹ a gift to A. to cease when she became a nun, was held to be legal. All conditions, however, abridging religious liberty, in the American States, where there is no common law or established church, would seem to be, in the main, against constitutional law and the principles of public policy. In *Shackleford v. Hall*,² a condition subsequent in general restraint of marriage, was held to be valid and to divest the estate. Devises in restraint of marriage, without any gift over, are valid in Pennsylvania.³

A devise on condition not to marry except according to Quaker rules was held valid in *Houghton v. Houghton*,⁴ but invalid in *Maddox v. Maddox*.⁵ It seems clear that, on principle, such restrictions are invalid. A restraint against marriage, when extended to whole classes, is evidently unlawful; but, confined to a class, it does not perhaps abridge freedom of choice too much. Therefore, a condition against marrying a Scotchman was held to be valid in *Peirren v. Lyon*.⁶ But a condition to marry none but a Scotchman would seem to be too general, and, as such, void.

If a bequest is made to a legatee at twenty-one, or on marriage with consent, with a clause of forfeiture upon marriage without consent, if the legatee attains twenty-one, the condition is gone.⁷ If a trustee withholds his consent without cause, the court will authorize a marriage without consent. Jarman thinks⁸ the court

¹ 5 Johns. Ch. 459.

² 19 Ill. 212.

³ 2 Redfield, 304.

⁴ 1 Moll. 611.

⁵ 11 Grat. Va. 804.

⁶ 9 East. 170.

⁷ See *Chauncey v. Graydon*, 2 Atk. 616; *Durney v. Schaeffler*, 24 Mo. (3 Jones) 170; *Hughes v. Boyd*, 2 Sneed, Tenn. 512.

⁸ Vol. I. 844.

will not do this, if the consent was to be in writing. But, as a writing is merely the evidence of the consent, and there is a sufficient equity for the court to act *dehors* the document, its requirement would seem not to be material where there was bad faith on the part of the trustee.

A condition in partial restraint of marriage, unless there is a gift over, will not be held void in respect to legacies charged on land, so far as the realty must be resorted to, since the *in terrorem* doctrine is taken from the civil law, and is applicable to personal legacies only. These were formerly administered in the ecclesiastical courts, which adopted the rules of the civil, and not of the common law. But the latter law applies to devises and charges on land.

A condition that a legatee shall not dispute the will is also *in terrorem*, unless there is a gift over. But this doctrine is not applied to devises of land.

Where there was a devise on marrying with consent and a gift over on marrying against consent, the word "against" was read "without."¹

A consent to marriage must be before or at the time of its celebration. If one of the trustees is dead, the consent of the survivors will suffice, while, if the condition is subsequent, it is wholly gone. The consent may be express or implied, and one marriage with consent of testator, or of the trustee, destroys the condition forever afterwards.² This is a general rule of conditions, except so far as the law is altered by statute or judicial construction. If a condition, even at the present day in some of the States, is released once, it is gone for ever.

A general consent is sufficient. But a consent to a marriage with A. is no consent to a marriage with B.

¹ Long v. Ricketts, 2 Sim. & Stu. 179.

² 2 Williams, Ex. 2d Am. ed. p. 914, *et seq.*

A consent once given cannot be retracted. The consent of all the trustees who have acted, or of the survivors, is sufficient.

A condition that the beneficiary shall change his name is fulfilled by his doing so, without compliance with any ceremony that may be required by law for that purpose.

§ 6. *Equitable relief.*

The question of the inter-dependence of covenants in the same instrument is mainly determined by the order of time of their performance.¹ If an estate be limited to A. on his marriage with B., this is a condition precedent.² It is strictly enforced, and equity will hardly relieve against its non-fulfilment. The case of the *City Bank v. Smith*³ is, as the note in *Kent* alleges,⁴ an authority for holding that equity will relieve in the case of a condition precedent. But the circumstances under which the court will thus exercise its remedial jurisdiction are very rare.⁴

The court, however, will either relieve against a breach of a condition precedent, or interfere to defeat a vested interest, when the condition is intended to secure a sum of money or the performance of any other act, and the loss can be readily made the subject of compensation.⁵

Conditions are apportionable in most of the United States as in England, so far as that a waiver of forfeiture operates only for that occasion, and does not destroy the condition.⁶ Yet, at common law no condition was apportionable.

¹ 4 Kent Com. 125, note.

² *Ib.*

³ 3 Gill & J. 265.

⁴ 4 Kent Com. 125; Story, §§ 1320-26; *Gregory v. Wilson*, 9 Hare, 689; *Thompson v. Hudson*, L. R. 2, Eq. Cas. 612; 2 Ch. App. 255.

⁵ *Flandears v. Lamphear*, 9 N. H. 61.

⁶ See 21 Vict. c. 27. *Supra*, 268.

CHAPTER XXII.

TRUSTS FOR SEPARATE USE.

A trust for the separate use of married women, in respect to which they can act precisely as if they were unmarried, may be created in the American States. But the intention must be very explicit.¹ A trust for her "sole use and benefit," however, is sufficient for this purpose.² So is a trust of "property to remain in her possession," "for her special use and benefit,"³ "for her own use and benefit absolutely,"⁴ "for her own use and at her own disposal," "for her livelihood," "her receipt to be a sufficient discharge," "independently of any other person,"⁵ or, "whether married or single."⁶ But, a gift for separate use is not raised by the use merely of the words "absolutely," "for her own absolute use," or "for her own use and benefit," "to her and the heirs of her body, and them alone,"⁷ "entirely for her and her children," or, "for her own use and benefit."⁸ Neither do the words "own," "proper," or "absolute" use, raise a trust for a separate use.⁹

For phrases that will create a trust for the separate use of a married woman, see the authorities referred to

¹ *Stevenson v. Schriver*, 9 Gill & J. 324.

² *Jarvis v. Prentice*, 19 Conn. 272; see *Jones v. Jones*, 7 Ga. 76.

³ *Freeman v. Flood*, 16 Ga. 528.

⁴ *Tarsey's Trust* L. R. 1 Eq. 561.

⁵ *Lee v. Priaulx*, 3 Bro. C. C. 381.

⁶ See *Shewell v. Dwarries*, Johns. Eng. 172.

⁷ *Foster v. Kerr*, 4 Rich. Eq. 390.

⁸ *Foley v. Foley*, Irish Ch. App. 18 W. R. 81.

⁹ *Rycroft v. Christy*, 3 Beav. 238.

in the note.¹ *Seemle*, any expressions of desire that her husband or his creditors shall not attach the wife's estate will render it separate. The appointment of a trustee for this or any other trust by the testator is unnecessary. For, it is a maxim of equity that it never wants a trustee, and when a trust for a married woman is raised, it will regard the husband as the trustee, if none other is appointed.²

A trust for the separate, inalienable use of a woman on future marriage is valid.³ But, a trust for the use of a man for life, without anticipation, is void. He may assign his life interest, or it will pass to his assignees in bankruptcy.⁴ The American law, however, on this point, is not as rigid as the English.⁵

A gift to husband and wife and a third person, gives the husband and wife only a moiety, and not two-thirds, as husband and wife are only one person in law. This rule applies to land as well as personalty, and whether the limitation be to the donees as joint tenants, or as tenants in common. But, if the gift be to A. (husband) and B. (wife), the limitation, thus worded, will give them a share each, though the wife will not take to her separate use in the equitable sense of that phrase.

¹ Clancy's Rights of Women, Am. ed. p. 262, *et seq.*; *Hamilton v. Bishop*, 8 Yerg. 33; *Hulme v. Tenant*, 1 Br. C. C. 16; s. c. 1 White & Tud. Lead. Cas. and notes thereto, 2d ed. 394, *et seq.*

² 2 Story Eq. Jur. § 1392; *Bradish v. Gibbs*, 3 Johns. Ch. 540.

³ 1 Beav. 34.

⁴ 2 Story Eq. Jur. § 1382.

⁵ See *supra*, chapter XXI, § 3.

CHAPTER XXIII.

GIFTS TO CERTAIN PERSONS AND CLASSES.

§ 1. *Gifts to a class.*

A legacy to a class is often confined by the context to the individuals known to the testator. But if a class is really intended by him, the text writers say that all will participate who answer the description of the class when the gift takes effect in possession—that is, at the period of distribution. This statement, however, proves nothing. The question, is, when does the period of distribution occur. Indeed, gifts to classes are not all construed in the same manner with respect to the period of distribution. Sanders, in his note to *Heathe v. Heathe*, says that, in the case of a gift to children, where the gift is not confined to time, the death of the testator is the period when the members of the class are to be reckoned, but where the distribution is postponed on account of a preceding gift for life or otherwise, then all who are born before the period of distribution take, but not those born afterwards.¹ If, however, the particular tenant dies in the lifetime of the testator, all who are born into the class afterwards, but in the lifetime of the testator, will take.² It is thus plain that in England and in most of the States an immediate gift to “children,” “grandchildren,” “issue,” “brothers,” “sisters,” “cousins,” refers to those in existence at the testator’s death, if there be any such at that period.³ Those who do not survive the testator take nothing⁴ in Eng-

¹ 2 Atk. 121.

² *Carver v. Oakley*, 4 Jones Eq. 85.

³ *Viner v. Francis*, 2 Cox, 190.

⁴ *Devisme v. Mello*, 1 Bro. C. C. 537.

land and most of the States. But if the gift is not immediate, all will take who correspond with the description at or before the period of distribution, or represent those who so correspond. The members of the class take vested interests at the testator's death, *sub modo*, or subject to be partially divested by the appearance of a new member of the class, but not lost by their own decease before the period of distribution. It is then transmitted to their representative.¹

The rules relating to this point, therefore, may be thus summarized:—Gifts to children apply only to those who correspond with the description at the period of distribution. Therefore, immediate gifts extend only to those who can claim to be beneficiaries at the testator's death. But, deferred gifts will be applied in favor of all, or their representatives, who correspond with the description any time after the testator's death and before the period of distribution. Where the shares of children or other members of a class are made payable at twenty-one or marriage, the period of distribution occurs when the contingency first happens. None can take who do not answer the description until afterwards.²

Immediate gifts to children mean those living at the testator's death.³ Deferred gifts include all, or their representatives, born before the period of distribution.⁴ If there is no preceding limitation, but the testator's interest in the subject-matter of the bequest is itself reversionary, the rule in *Oppenheim v. Henry*⁵ still applies, and all who come within the definition of the

¹ *Oppenheim v. Henry*, 10 Hare, 441.

² *Andrews v. Partington*, 3 Bro. C. C. 403; see *Gillman v. Daunt*, 3 K. & J. 48.

³ *Jenkins v. Freyer*, 4 Paige, 47; *Van Hook v. Rogers*, 3 Murph. 178.

⁴ *Haskins v. Tate*, 25 Penn. St. 249; *Carroll v. Hancock*, 3 Jones' Law, (N. C.) 471.

⁵ 10 Hare, 441.

class down to the period of distribution will take. This latter rule, does not apply to a limitation of residue to a class, if only part of the residue be previously given by the will to others for life. The residuary legatees must correspond with the description in the will at the time of testator's death. Gifts *subject* to a term are also considered as immediate.¹

Perkins, J.,² and Redfield, J.,³ lay down the position that, where a legacy is given to a class of individuals, it will take in all who answer the description at the time the gift shall take effect. If by taking effect is meant the period of distribution, this is true only as applied to children, and not to next of kin. If the phrase means the death of the testator, it is not accurate as regards gifts to children, the period of distributing which is deferred. In other words, no general rule can be applied to gifts to classes; since gifts to children, brothers, sisters, nephews, nieces, &c., with respect to the point in question, are construed differently from gifts to other classes of persons.⁴

The rule which gives vested interests only to those persons who come within the definition of a class of beneficiaries at the testator's death applies, though the phrase "all and every" be used. The members still take as a class, and not individually. Of course, if the context means otherwise, the express will of the testator must prevail. Therefore, a gift to "all the children of A. and B. who shall be born during the lifetime of A. and B," comprises all born within the period specified.⁵

When children are substituted for their parents dying before the period of distribution, the children must also survive the period of distribution, else their shares go to those who survive that period. This rule is per-

¹ Singleton v. Gilbert, 1 Cox, 68.

² 2 Jarm. 73.

³ Vol. II, 10. ⁴ 2 Jarm. 78. ⁵ Scott v. Lord Scarborough, 1 Beav. 154.

culiar to gifts to children. It imports into the substituted gift a condition which is expressly imposed by the testator only on the primary gift. The rule does not apply to other substitutionary legacies. Accruing shares to such are not by necessary implication subject to clauses of accruer imposed by the testator only on the primary shares.

A gift to such issue as a person may leave, points to the time of his death, and those who die before him take nothing.¹ A gift over in case of a prior devisee or legatee dying without children means without leaving children at his death. But "without having children" means without having had a child. The first legatee's interest, in the latter case, becomes indefeasible on the birth of a child.² The phrase "in case A. and B., husband and wife, have no children," means "in case no child survives both parents."³

The rule which postpones the reckoning of the members of a class of beneficiaries until the period of distribution applies only where the whole charge on the testator's estate is not thus increased. Therefore a gift of \$5,000 to all the children of A., payable to them when they attain twenty-one, will let in all children born after the testator's death who are born before the eldest child attains twenty-one. But, a gift of \$100 to each of A.'s children who shall attain twenty-one, will extend only to those answering the description at the testator's death. Else the administration of the testator's personalty should be indefinitely deferred.⁴ For this reason, also, though the payment of legacies is postponed for a year from the date of testator's death, this does not enlarge the class of beneficiaries.⁵

¹ 2 Jarm. 114.

² 2 Jarm. 113.

³ *Doe v. Nasmyth v. Knowles*, 1 Barn. & Adol. 324.

⁴ *Ringrose v. Bramham*, 2 Cox, 384. ⁵ *Hagger v. Payne*, 23 B. 479.

When the first share becomes payable the whole fund must then be distributed, even though there be words of ulterior futurity in the limitation as to "the children of A. born or to be born, as many as there may be." But, the rule which requires the distribution to be made when the first share becomes payable is founded on mere principles of convenience. It is a rule of construction, and not of law, and may be neutralized by a plain clause or context to the contrary,¹ or where the shares are not made payable until the youngest attains twenty-one,² or where the interest is to be applied until they attain twenty-one.³

If there be a gift to A. for life, remainder to the children of B. who attain twenty-one, or to be payable to them at twenty-one, the period of distribution is deferred to the latest of these events, and all who answer the description down to the occurrence of the last contingency will take.⁴

A gift to all "the present born children of A." will still apply only to those who survive the testator.⁵ Even a power to A. to appoint to the children of B. can be exercised only in favor of the children in existence at testator's death.⁶

The rule that a class is to be defined at the period of the testator's death does not apply when there are no persons then answering the description. In such an event, all who correspond with the description any time afterwards (within the bounds of perpetuity), are admitted,⁷ and the interest that accrues until the first.

¹ *Iredell v. Iredell*, 25 B. 485.

² *Mainwaring v. Beevor*, 8 Hare, 44.

³ *Armitage v. Williams*, 27 B. 346.

⁴ *Hawkins on Wills*, 77.

⁵ *Leigh v. Leigh*, 17 B. 605; see *Lee v. Pain*, 4 Hare, 250.

⁶ *Paul v. Compton*, 8 Ves. 375.

⁷ *Harrison v. Lloyd*, T. & R. 310.

taker appears falls into the residue. If the gift is a legal contingent remainder, it will, of course, also fail. But the rule applies only to immediate gifts. Where there is a gift, not to a class, but to individuals, and one of these dies before the testator, his share lapses.

It is not yet completely settled in England¹ whether a gift to children "born" or "to be born" will let in children born after the testator's death, or whether the testator merely contemplated the case of the birth of children between the making of his will and the time of his death.² In some cases such children have been admitted.³

It was held in *Kevern v. Williams*,⁴ that under a bequest to A. for life, remainder to the grandchildren of B., payable at their ages of twenty, none could take but those born in A.'s lifetime. The limitation, indeed, would, under any other construction, be void for remoteness.

A bequest of chattels to A., and, if he die without children, over, gives A. the absolute property, subject to an executory interest on the contingency specified.⁵ But, if the gift is to A. for life expressly, the limitation will resemble a devise of land to A. for life, and if he die without issue living at his death, remainder to B. In this case, if A. have issue, there is an intestacy of the subject of bequest after A.'s death. The courts, however, will be astute in discovering in the context some means for implying interests in the children by purchase. The natural mode of interpreting the word issue would seem to be to construe it as a word of purchase, and also as conveying a fee tail. But, it was held at an

¹ Hawkins, 71.

² *Deffis v. Goldschmidt*, 1 Mer. 417; *Mogg v. Mogg*, 1 Mer. 654.

³ Hawkins, 71.

⁴ 5 Sim. 172.

⁵ *Weakley d. Knight v. Rugg*, 7 Durn. & East. 322.

early date to be a word of limitation in wills, and from this construction all the complications resulting from the use of the phrase have been derived.¹

Deferred gifts become all payable on the first vesting in *possession* of any one share. Therefore, gifts to the children of A. on marriage, become distributable when any of A.'s children marries. But, if the gift is to them at twenty-one, only children born before the period of the testator's death can take, otherwise the whole personalty of the testator should remain unadministered. This exception to the general rule as to deferred gifts does not apply when, as already stated, the total amount to be given to the whole class is fixed by the testator.

To A. for life, remainder to the children of B., there being no children of B. born during A.'s life, children of B. born after A.'s death will take, if the limitation is one of personalty, or an equitable trust of realty. But, if it is a legal contingent remainder, it fails,² unless there is a limitation to trustees to preserve, &c., during the life of B.

Therefore, under a gift to children after a life estate, all children living at testator's death, and all born during, but not after, the pendency of the life estate, will participate; but none of those born after the determination of that estate will take, unless there were no children then *in esse*. In this event, all born afterwards will take, unless the limitation is a legal contingent remainder, unsupported by an estate in trustees. The distribution of the fund will not be delayed, nor the class enlarged, because there is a gift over on failure of the whole class.³

Although, if there is, at the time of the testator's death, no person answering the description of the class of

¹ *Ex parte Rogers*, 2 Madd. 449.

² 2 Jarm. 92.

³ *Andrews v. Partington*, 3 B. C. C. 401.

children referred to in the will, all the children born subsequently to the death of the testator will take, yet, the rents, meantime, of the reality will fall to the heir at law, unless there is a general residuary devise. When any child is born, he takes the whole income until another is born, and so on.¹

A gift to children "now living" extends only to those living at the date of the will. But, the word "begotten" has a prospective as well as retrospective force.² The words "to be born" will let in all future children, unless the case be one of a general pecuniary legacy. The same words do not exclude children already born.³ Jarman seems justly to disapprove of this rule.⁴ For the express including of one class of children implies the exclusion of others. *Expressio unius, &c.*

In some American cases,⁵ under a gift to a class, it has been held that none can take but those who were living at the date of the will, while even of these, the shares of any who predecease the testator, will accrue to the others. Judge Redfield⁶ considers that the rule in those States, where the question has been most carefully considered, is to reckon the members of the class "when the gift takes effect." This phrase, he explains afterwards, to mean the period of distribution. Therefore a devise in remainder to a class, will operate only for those (or their representatives), who belong to the class on the death of the particular tenant.⁷

¹ *Shepherd v. Ingram*, Amb. 448.

² 2 Jarm. 102.

³ *Doe d. James v. Hallett*, 1 Mau. & S. 124.

⁴ 2 Jarm. 101.

⁵ *Stires v. Van Rensselaer*, 2 Bradf. 172; *Lawrence v. Hebbard*, 1 Bradf. 252.

⁶ Vol. II, 10; *Hawkins v. Everett*, 5 Jones, Eq. 42; *Walker v. Williamson*, 25 Ga. 549.

⁷ *Kilpatrick v. Johnson*, 15 N. Y. 322; *Myers v. Myers*, 2 McCord Ch. 214, 256.

In *Campbell v. Rawdon*,¹ it was held that a devise in remainder to a class, takes effect at the decease of the testator. *Knight v. Knight*,² however, decides that the class is not to be computed until the death of the particular tenant, if there is one. The members of the class take as tenants in common.³

Where any of a class of legatees are *in esse*, survivorship will generally be construed in America, with reference to the time of the testator's death. A legacy to children, too, then becomes vested in interest in the children then living, but subject to open and admit after born children to a participation.⁴ Under a devise to A.'s "children, their heirs and assigns," the children of such as die before the testator, cannot take, but the children surviving him take the whole, as a class.⁵ A devise to the "surviving children of my late sister A., not knowing their names, they living in the State of Maine, to be divided equally among them all," was held to apply to all living at the date of the will. Any dying before the testator, nevertheless, transmit their interests to their representatives under the Massachusetts statute.⁶

A legacy to grandchildren on their attaining age, or marrying with consent, does not apply to a grandchild already of age and married.⁷ However, in *Collin v. Collin*,⁸ where a fund was given to a class, on their attaining age, those who had attained age at the tes-

¹ 18 N. Y. 412.

² 3 Jones Eq. 167.

³ *Phenes Trusts*, Law Rep. 5 Eq. 346.

⁴ *Mowatt v. Carow*, 7 Paige, 328.

⁵ *Stires v. Van Rensselaer*, 2 Bradf. 172; *Doubleday v. Newton*, 27 Barb. 431; *Tucker v. Bishop*, 16 N. Y. ; (3 Smith), 402.

⁶ *Morse v. Mason*, 11 Allen, 36.

⁷ *Hone v. Van Schaick*, 3 N. Y. (3 Comst.) 538.

⁸ 1 Barb. Ch. 630.

tator's death were held entitled to an immediate participation. The residue was left to be accumulated until the whole was distributed. This decision is what will be found applicable to the great majority of gifts to a class thus imperfectly described.

As to the period when "children" take vested interests, see further *Conley v. Kincaid*.¹ A posthumous child takes as if born in testator's life-time.²

§ 2. *Heirs.*

The meaning of the term "heirs" or "representatives," will, in all cases of doubt, be determined by reference to the statutory definitions of these terms.³ The word "heir," therefore, means the legal heir at the death of the testator. If the law has made a change in heirship, between the date of the will and that of the testator's death, the testator will be presumed to have contemplated the possibility of such change,⁴ and to have used his words accordingly.

Parol evidence is not admissible to vary the meaning of the term heir.⁵

Although the word "heirs" denotes the persons answering that description at the testator's decease, yet if there are intermediate estates, and if the limitation to the heirs is a contingent remainder, the reference will be to persons answering the designation, when the estate vests in possession.⁶

In *Hawn v. Banks*,⁷ the clause "and to her heirs,"

¹ 34 Ala. 208.

² 2 Head. 191; 1 Wins. Eq. 44; *Smith v. Ashurst*, 34 Ala. 208; *Carmichael v. Carmichael*, 2 Head. 191; *Beasley v. Jenkins*, 18 W. R. 129; *Hall v. Wooller*, 41 N. Y. 346; *Stoner v. Berndt*, 10 Penn. St. 213; *Osgood v. Livering*, 33 Me. 464; *Dickinson v. Lee*, 4 Watts, 82; *Van Gieson v. Howard*, 3 Halst. Ch. 462.

³ *Lyon v. Acker*, 33 Conn. 222; *Abbott v. Browning*, 3 Allen, 587.

⁴ *Aspden's Estate*, 2 Wall. Jr. C. Ct. 368.

⁵ *Id.*

⁶ *Abbott v. Bradstreet*; 3 Allen, 587.

⁷ 4 Edw. 664.

was held to be used in a substitutional sense. This is a very frequent meaning of the word heirs in a will. Probably in those States where a general devise passes a fee, the word "heirs" would be the more readily regarded as substitutional, in accordance with the general principle of interpretation that requires every word in a will to get, if possible, a specific meaning and not to be deemed mere emphatic surplusage.

The term "heirs" means only heirs *de jure*, and not devisees.¹ Conversely, an heir will not take by devise when he may take by descent. For, when a person can claim by act of law as well as by matter *in pais*, he is remitted to his legal title. The courts presume a legal title to be better than a contractual or testamentary one.² This presumption, too, is a conclusive one. A title at common law is also deemed superior to one by statute, and it extinguishes an equitable title when both concur in the same person.

In *Drake v. Pell*,³ legacies were given to children, or if any one should die after the testator, and after attaining age, and before the youngest attained age, then to his heirs, devisees, or legal representatives. It was held that as the property was personal, the term "heirs" and "legal representatives" were synonymous with next of kin, and did not include the executors or administrators; that the word "devisees" gave a power of appointment, and that these were words of purchase. But, although the word "heirs" may thus be a term of purchase,⁴ yet, under a bequest to legatees, or to "their heirs," one of the legatees being dead at the date of the will, it was held that there was no lapse. The property, however, being personal, went

¹ Porter's Appeal, 45 Penn. St. 201; see *Stover v. Berndt*, 10 Penn. St. 213; *Bond's Appeal*, 31 Conn. 183.

² *Barnitz v. Casey*, 7 Cranch. 456.

³ 3 Edw. 251.

⁴ *Murphy v. Harvey*, 4 Edw. 131.

not to the legatee's heirs, but to her next of kin, excluding her husband.¹ In a bequest to "J. and his children, to be equally divided between them and their heirs and assigns forever," the word "heirs" was held to be a term of limitation.² A limitation to "heirs" intended to take during the life of their ancestor, would, in England, be generally confined to mean heir in the singular number.³ But, in America, under such a devise, the next of kin would take.⁴

In *Chambers v. Taylor*,⁵ it was held that a devise to the heir female created only an estate for life. However, under a devise to one's heir, the legal heir usually takes a fee. But, where a division is directed to be made amongst heirs, these mean next of kin.⁶ A grant by deed to A. and his heirs male will not apply to a daughter, but will to a brother,⁷ though neither satisfies both the conditions of the gift, and, if the grant were to the heir general, neither would take. In a will, however, the clause heir male confers an estate in tail male.⁸

An heir male or female by descent must trace title all through heirs of the kind designated. But, *semble*, an heir male or female by purchase is not so strictly bound;⁹ and, therefore, the son of a deceased female may take by purchase under the description of heir male. So, also, under a devise by a testator to the heir male of his body, on his death leaving grandchildren only, the issue of his daughters, the eldest sons of each daughter will take.¹⁰

¹ *Wright v. Method. Epis. Ch. Hoffm.* 202.

² *Armstrong v. Moran*, 1 Bradf. 314.

³ *Janes v. Richardson*, 7 T. Jon. 99; *nom. Burchett v. Durdaunt*, Raym. 330.

⁴ *Simmons v. Garrot*, 1 Dev. & Bat. Eq. 393.

⁵ 2 My. & C. 376; see *Winter v. Peeratt*, 9 Cl. & Fin. 606.

⁶ *Baskin Appeal*, 3 Barr. Penn. 304.

⁷ *Wills v. Palmer*, 5 Burr. 2617.

⁸ *Doe d. Lindsey v. Calyear*, 11 East, 548. ⁹ *Hobart*, 31. ¹⁰ 2 Jarm. 11.

Sir Edward Coke,¹ indeed, considered that an heir male, taking by purchase, must be the heir general and also a male, but need not make out descent through males; in other words, Sir Edward thought that the clause in question did not denote an estate in tail male. This doctrine, however, has been expressly overruled as regards limitations to heirs male *of the body*, taking by purchase, that is, where the ancestor takes no estate. The clause now confers an estate tail to which title can be only traced through males. Lord Coke's position would still probably be followed in the case of a limitation to "heir male"² in a deed. But in a will this clause also confers an estate in tail male.³

According to Coke, then, the heir male of the body taking by purchase should be heir general, but need not trace title through males. By the present law "the heir male" under a will must trace title through males, though he need not be heir general, but only heir in tail male.

A "male descendant,"⁴ too, or an "eldest male lineal descendant"⁵ must claim title through males only.

Under a devise to the right heirs of A., being of the name of B., no person can claim, except one who is both heir general of A. and also of the name of B.⁶ In the case cited, Parke, J., considered that the doctrine of Lord Coke, that an heir male need not be heir general, was overruled only as to estates tail. The limitation in question, however, in a deed has no special force. It is only equivalent to a limitation to the heir. It is only under a will, therefore, that the question can arise. The testator must mean a person to be his heir general and

¹ Co. Lit. 246.

² *Wills v. Palmer*, 5 Burr. 2615.

³ *Doe d. Angell v. Angell*, 9 Q. B. 328.

⁴ *Bernal v. Bernal*, 3 My. & Cr. 559.

⁵ *Oddie v. Woodford*, 7 H. L. C. 429.

⁶ *Wrightson v. Macauley*, 14 M. & W. 214.

also a male, else the law will deem the heir male to be a tenant in tail male.

A devise to A. for life, remainder to the heir male of his body, and to the heirs male of the body of such heir male, gives A. only an estate for life.¹

In *Chamberlayne v. Chamberlayne*,² the rule in *Archer's* case was applied to a devise to A., to hold to him and the heir male of his body, and the heirs and assigns of such heir male, although in a deed the *habendum* alone properly contains the limitation of estate, and the word assigns is in all such cases inoperative, though it is of use in certain covenants. The rule in *Archer's* case, indeed, is sound; but, then, its application, as in *Chamberlayne v. Chamberlayne* is generally inconsistent with a host of authorities in which the rule in *Shelley's* case has been adopted.

Under a devise to A. and his heirs, and to B., who is one of the heirs of A., B. takes as devisee and also as heir.³

In New York, where the rule in *Shelley's* case has been abolished, under a devise to A. for life and after his death to his heirs, the heirs take a contingent remainder by purchase.

In *Heard v. Horton*,⁴ a distinction was taken between a devise to the heirs of one who is stated in the will to be now living, and a devise to his heirs without any statement as to his being either alive or dead. The court inclined to hold the latter devise void, though the former would be held to apply to those who where the heirs specified at the date of the will. The distinction, however, appears rather nebulous, and to be fit only for the elementary stages of jurisprudence, when *cy pres* or liberal constructions are rare.

¹ *Archer's Case*, 1 Rep. 66.

² 6 Ell. & Bl. 625.

³ *Stowe v. Ward*, 1 Dev. 67; s. c. 3 Hawks, 604; see *supra*, c. VI.

⁴ 1 Denio, 165.

A devise to A. and his heirs lawfully begotten,¹ gives A. an estate tail. A devise to A. and his lawful heirs gives him a fee. A devise to A. and his heirs, and, if he die without issue or heirs of his body, then over, gives A. only an estate tail.² Even in a deed, a limitation to one and his heirs in the premises may be reduced by an *habendum* to him and the heirs of his body to an entail. *A fortiori*, may a later clause in a will control a prior one of the same genus. But, if the gift over be on a failure of issue, at a date within a life or lives in being, and twenty-one years after, A. takes a fee subject to an executory devise.³

If land be devised to B. alone, or with others, on failure of A.'s heirs, and B. is capable of being heir to A.,⁴ then A. takes by implication only an estate tail. For, every word in a will must receive a meaning, unless the context or the primary intention of the testator precludes such interpretation. So, a gift to A., after the death of B., of property which A. would take immediately upon the testator's intestacy, gives to B. by implication a life interest, unless otherwise disposed of by the will. This rule applies to both realty and personalty,⁵ but is not likely to be extended beyond its present limits. Such abnormal limitations are probably owing wholly to some mistake on the part of the testator with respect to the inherent claims of the implied devisee. If, indeed, this tenant for life be a relation or widow⁶ of the testator, it is plain that he or she should be deemed to take a life estate by implication. But, in other cases, the limitations in question are, it is proba-

¹ Co. Litt. 206, *n*.

² Doe *d.* Ellis *v.* Ellis, 9 East, 382.

³ Eastman *v.* Baker, 1 Taunt. 174.

⁴ Harris *v.* Davis, 1 Coll. 423; *vide supra*, c. 7, 14.

⁵ Stevens *v.* Hale, 2 De. & Sm. 22.

⁶ See 1 Keen, 176.

ble, mere mistakes arising from some misconception of facts by the testator.

The word "heirs," in connection with personalty, is often construed to mean children. In America it will generally mean all who take under the statute of distributions, and will include the widow.¹ In Maine it means almost any person except the common law heir.

Even though the subject-matter of the devise is governed by a peculiar local law of descent, yet a devise to the heir still enures to the common law heir.² If the subject-matter is personalty, and the gift is substitutionary, as, "to A., and, if he die before me, to his heirs," his next of kin will take.³ Probably this rule applies to all dispositions of personalty, whether they are substitutionary or not. It does not, however, comprise mixed gifts of realty and personalty. The heir will be preferred in such cases, at least in England,⁴ though probably not in America.⁵

Where the fund is mixed, the word "heirs" will be interpreted literally.⁶ It was held by Giffard, V. C., however, in *Herrick v. Franklin*,⁷ "that the term would be interpreted differently when applied to personalty, according to the precedent set in *Forth v. Chapman*."⁸ There is not, indeed, any very essential difference between rules of limitation and the meaning of a term denoting a class of beneficiaries. Still, to give one clause two different meanings, as was done in *Forth v. Chap-*

¹ See *Richardson v. Wheatland*, 7 M et. 173.

² 2 Jarm. 22.

³ *Vaux v. Henderson*, 1 Jac. & Walk. 388, n.

⁴ *Evans v. Salt*, 6 Beav. Ch. 266.

⁵ See 4 Kent, (5th ed.) 537, n.; *Croom v. Keering*, 4 Hawks, 393; *Ricks v. Williams*, 1 Badg. & Den. 391.

⁶ *De Beauvoir v. De Beauvoir*, 15 Sim. 163; s. c. 3 Ho. of Lds. Cas. 524, 557.

⁷ Law Rep. 6 Eq. 593.

⁸ 1 P. Wms. 164.

man, is perhaps bold where no rule of tenure is directly in question.¹

Heirs at law in a bequest mean next of kin.² But, if real and personal estate are both so limited after a life estate, the heir will take all, unless the will discloses an intention that, *reddendo*, &c., both heirs and next of kin should take their respective and appropriate interests, and not that the whole should be enjoyed together.³

The courts, even in England, do not construe limitations of personalty as technically as those of realty. In America, as the devolution of realty is nearly the same as that of personalty, many stumbling-blocks of discontent are thus removed. The heir, too, is more freely allowed to take as purchaser here than in England,⁴ though this construction is not so readily allowed where the limitation is of a future estate.⁵

An heir may, in some of the United States, take a legacy under a will and also after acquired lands, contrary to the dispositions of the will.⁶ Such is the statute law of Maryland.⁷ The law on this point has been altered in Pennsylvania.⁸

By the Revised Statutes of New Jersey, 1847,⁹ on a devise to one for life, and at his death to his heirs, or issue, or heirs of the body, the lands after the death of the tenant for life go to his children as tenants in common in fee. In the same State a bare trust estate descends to the eldest son by primogeniture, as those estates are not within the State statute of descents.¹⁰

¹ See 1 P. Wms. 164.

² Ricks v. Williams, 1 Dev. Eq. 1.

³ Gwynne v. Muddock, 14 Ves. 488; Gillian v. Underwood, 3 Jones Eq. (N. C.) 100; Patterson v. McMasters, *Id.* 208.

⁴ 2 Redf. on Wills, 66.

⁵ Campbell v. Rawdon, 18 N. Y. 412.

⁶ City of Philadelphia v. Davis, 1 Wharton, 490; *contra*, Thelusson v. Woodford, 13 Ves. 209.

⁷ 4 Kent Com. 510; Laws of Md. 1850, c. 259.

⁸ Act of 8th April, 1833.

⁹ P. 740.

¹⁰ Wills v. Cooper, 1 Dutch. N. J. 137.

§ 3. *Executors.*

Under an immediate gift to A. or his heirs, the heirs will take by substitution, if A. dies in testator's lifetime. But, if the gift be to one for life remainder to A. or his executors, A. takes the whole interest, and on his death in testator's lifetime the gift will lapse.¹

It is thought that though a gift to A. or his representatives after a life estate means a gift to A. and his executors, yet, that an immediate gift to A. and his representatives must mean one to A. and his next of kin; else, if the legatee dies during testator's life-time, the gift lapses, and A.'s representatives take nothing. The distinction seems not to be well founded, though supported by the cases of *Bridge v. Abbot*² and *Cotton v. Cotton*.³ Or, rather, the rule acted on in these cases should govern alike both immediate and deferred gifts.⁴

The term "executors" or "representatives" means next of kin, when the words "share and share alike" &c., are added. The term is then equivalent to "heirs" taking by substitution, and includes a widow,⁵ but not a husband.⁶ These distinctions, however, would hardly be observed in the American States. Yet, it is important to know the English rules on such questions, as the English authorities, though not necessarily conclusive, would doubtless have weight with our tribunals.

Under a gift to A. and his executors, or to A. and his administrators, or to A. and to his legal representatives, A. takes the whole interest. The phrase "legal

¹ *In re Porter's Trust*, 4 K. & J. 188; *Bone v. Cook*, McLel. 168.

² 3 Bro. C. C. 224.

³ 2 Beav. 67; see *in re Crawford*, 2 Drew, 230.

⁴ See *King v. Cleveland*, 26 Beav. 26; *Gray v. Garman*, 2 Hare, 268.

⁵ *Smith v. Palmer*, 7 Hare, 225.

⁶ *King v. Cleveland*, 4 De G. and J. 447.

representatives," or "personal representatives," however, has frequently been held to mean next of kin,¹ just as the word heirs sometimes means children or more distant relatives. The primary meaning of "representative," indeed is administrator.

Even a gift to executors or administrators has been sometimes construed as a gift to next of kin.² Yet, the ruling, in *Palin's* case seems hardly sound. The limitation was obviously analogous to one for life, remainder to his heirs. This remainder vests in the ancestor. Why should not a similar limitation to executors be construed in the same manner?

The word "next" prefixed to "legal representatives" shows that the executors or administrators were not intended.³

A bequest of personalty to the representatives of A. means his executors. The property passes to them, and not directly to the next of kin.⁴ In all cases where the word "executors" or "administrators" is not a term of limitation, but of purchase, they will still hold the interest, not for their own benefit, but officially as part of the personal estate of the testator, unless the context is to the contrary.⁵ The case of *Wallis v. Taylor*,⁶ though acquiesced in by *Jarman*, seems to be an infirm leaning to the contrary. In that case the executors were held entitled for their own benefit. The interest, therefore, given to them, neither vested in the tenant for life nor went to the next of kin. Executors, no doubt, may take beneficially. But the context in *Wallis*

¹ *Bridge v. Abbot*, 3. B. C. C. 224; see *Long v. Blackall*, 2 Ves. 486.

² *Palin v. Hills*, 1 Myl. & Keen, 470.

³ *Booth v. Vicars*, 1 Coll. C. C. 6.

⁴ *Hinchclyfe v. Westwood*, 2 De G. & Sm. 216.

⁵ See *Stocks v. Dodsley*, 1 Keen, 325; *Long v. Blackhall*, 3 Ves. 483; Stat. 1 Wm. 4 c. 40.

⁶ 8 Sim. 241.

v. Taylor does not appear to have been sufficiently clear for this purpose.

A legacy to an executor means an acting executor.¹

The term "assigns" following "executors and administrators" is always a word of limitation.²

§ 4. *Son, issue.*

The word son is frequently a word of limitation ; as, for instance, under a devise "to A., and if he dies not having a son," then over, here A. takes an estate tail. The word child, in the singular number, often has the same meaning. But, the primary meaning of the term son or child, or indeed of any word except "heir," in a deed, and except "heir and issue," in a will, is one of purchase, if the word may, in a secondary sense, be construed a term of limitation.³

"Descendants," as a rule, will not include collateral relations.⁴ The term "descendants" means issue of every degree and all take *per capita*, and concurrently with their parent.⁵ Conversely, "issue is synonymous with descendants."⁶ These were cases of bequests. But the word issue means the same persons, in a devise of realty.⁷ If, however, the ancestor gets an estate for life, the word issue will then be equivalent to heirs of the body, and the ancestor will take an estate tail. As the issue take concurrently estates in New York by the Revised Statutes, and in those other States having the

¹ *Rothmaler v. Myers*, 4 Desaus, 215.

² *Graffey v. Humpage*, 1 Beav. 46 ; see also *Hames v. Hames*, 2 Keen, 646.

³ See 2 Moo. & Pay. 512.

⁴ *Hamlin v. Osgood*, 1 Redf. Sur. Rep. 409 ; *Baker v. Baker*, 8 Gray, 101.

⁵ *Butler v. Stratton*, 3 B. C. C. 367.

⁶ *Haydon v. Willshire*, 3 Durn. & E. 372, *Davenport v. Hanbury*, 2 Ves. 257 ; *Kingsland v. Rapelye*, 2 Edw. 1.

⁷ *Cooke v. Cooke*, 2 Vern. 545 ; *Mogg v. Mogg*, 1 Mer. 654.

same law, there is the more reason now for adopting the construction mentioned.¹

The words "issue," "son," "child," will be less readily held to be words of limitation in bequests than in devises of freehold. Sometimes these terms will be construed words of purchase as to the absolute interest, subject to a life interest in their ancestor, or as conferring a substitutional gift, in case of a lapse of the gift to him.²

In the American States, "issue" is held to be a term of limitation.³ It is, in the main, equivalent to heirs of the body. The distinctions are,⁴ first: The rule in *Wild's case* does not apply to a devise to one, and his issue. Secondly, words of distribution, as "share and share alike," superadded to the word "issue," will prevent the ancestor from taking an estate tail, although such distributive expressions would have been inoperative if, instead of "issue," the phrase in question were "heirs of the body." Under a devise to A. and his issue, some old cases give A. only a life estate, with remainder to his first and other sons in tail. But, at the present day A. would doubtless take an estate tail, since, even if the devise be to A. for life, and after his death to his issue, A. takes such an estate.⁵

A devise to A. and his issue living, at his death has been held to be an estate tail in A.⁶ But, this ruling is probably now obsolete. Under such a devise, A. would at the present day most probably take, in the American States, an estate for life, with remainder to his eldest son surviving him, whilst the personalty would be

¹ See 2 Jarm. 35.

² 2 Jarm. 498.

³ *Kingsland v. Rapelye*, 3 Edw. 1.

⁴ *Ferrill v. Talbot*, Ril. Ch. Co. 247; *Kingsland v. Rapelye*, 3 Edw. 1.

⁵ *King v. Melling*, 1 Vent. 225.

⁶ *University of Oxford v. Clifton*, 1 Ed. 473.

divided amongst all the issue. At least, by giving the personalty to the eldest son, its ulterior devolution amongst the issue of A. would not be secured in the way in which the realty would. Where the rules of law differ in respect to the devolution of realty and personalty, why should not the rule in *Forth v. Chapman*¹ be acted on, when necessary, and the same words be construed differently in respect to both descriptions of property.²

Jarman³ considers that under a devise to A. and his issue, and if he die without issue living at his death, remainder over, A. takes an estate tail. The case of *Lyon v. Michell*⁴ decided that a similar limitation of personalty was valid, although a quasi entail of personalty standing alone would give the absolute interest, and no remainder could be limited thereon.

The rule in *Shelley's Case* is not precluded by the addition of words of limitation descriptive of the same kind of heirs as referred to in a previous limitation to issue, as a devise to A. for life, and after his decease to his issue male, and the heirs male of the body of such issue.⁵ Jarman thinks that even if the ulterior limitation is to the heirs general of the issue, the ancestor still takes an estate tail.⁶ Authority is not in favor of this view. For, the case of *Loddington v. Kime*⁷ is distinguishable from those by which Jarman thinks it has been overruled. *Loddington v. Kime* appears to be still law.⁸

The cases cited by Jarman as overruling *Loddington v. Kime* all contained the clause in default of such

¹ 1 P. W. 663.

² See 2 Jarm. 330, note.

³ Vol. II, 359.

⁴ 1 Madd. 467.

⁵ *Roe d. Dodson v. Green*, 2 Wils. 322.

⁶ *King v. Burchell*, 1 Ed. 424.

⁷ 1 Salk. 224.

⁸ See *Doe d. Cooper v. Collis*, 4 Durn. & E. 294; and *Frank v. Stovin*, 3 East, 553.

issue. With respect to this clause, Jarman says,¹ "To say that the words 'in default of such issue' refer to the prior devisees, whoever they may be, and that those objects mean issue indefinitely, by the effect of the words in question, seems very much like reasoning in a circle." But is not a similar process of interpretation adopted by every reference to the context, and conversely? A will is like a sorites or series of distinct propositions, all illustrating the general purpose of the testator, and mutually reflecting light on each other.

In the American States, the word "children" is, primarily, a term of purchase,² and not of limitation. It includes only immediate issue lawfully begotten, and not illegitimate children, unless the gift will otherwise be inoperative, or the context indicate an intention to include them.³

In the American States, a legacy to children will not include grandchildren,⁴ but will extend to all after-born children, unless the testator very explicitly declares to the contrary. A like rule prevails as to all the children of others who are born previous to the period of distribution. If the legacy be in remainder, of course it is not necessary for a legatee to survive the period of distribution.⁵

As the term "children" does not include grandchildren, so "nephew" does not include great-nephew, or a nephew by affinity,⁶ though the latter point has been recently otherwise decided in England,⁷ contrary to the preceding cases.

Grandchildren will take under a gift to children, if

¹ Vol. II, 344.

² *Chrystie v. Phyfe*, 19 N. Y. 344.

³ *Cromer v. Pinckney*, 3 Barb. Ch. 466.

⁴ *Hallowell v. Phipps*, 2 Whart. 376.

⁵ *In re Orton's Trust*, Law Rep. 3 Eq. 375.

⁶ *Smith v. Lidiard*, 3 K. & J. 252.

⁷ *Grant v. Grant*; 39 Law J. N. S. 140, 272.

there are none such.¹ Jarman² is opposed to this view if the parent is living; for then there is a possibility of his having children. Jarman's view seems to be sound. Else the testament will be interpreted by events.

Children may, by the context, include deceased children,³ grandchildren or step-children,⁴ and the phrase, "all the children of my brothers," though used as if to designate a class, may be held to denote nephews and nieces enumerated elsewhere in the will.⁵ "Grandchildren" do not comprise "great-grandchildren," although there may be a clause in the will expressly including grandchildren under the term children,⁶ unless the context is explicit on the point. "Nephews and nieces" may be shown by circumstances to include grand-nephews and grand-nieces, or even a great-grand-niece.⁷

As, in the United States, posthumous children are, for all testamentary purposes, the same as other children,⁸ therefore under a limitation to children "born" at a particular period, a child then *ventre sa mere* will take.⁹

A power to appoint to children will not authorize an appointment to grandchildren, even when there are no children.¹⁰

Adopted children are not the children of the adopter's wife.¹¹

¹ Drayton v. Drayton, 1 Desaus, 327; see Smith's case, 2 Desaus, 308.

² Vol. II, 52.

³ Lawrence v. Hebbard, 1 Bradf. 252.

⁴ Barnes v. Greenzeback, 1 Edw. 41; see Lawrence v. Hebbard, 1 Bradf. 252.

⁵ Lorillard v. Coster, 5 Paige, 172, 184.

⁶ Hone v. Van Schaick, 3 N. Y. (3 Comst.) 538.

⁷ Cromer v. Pinckney, 3 Barb. Ch. 466; Bowers v. Brower, 9 N. Y. Leg. Obs. 196.

⁸ Rev. Stat. N. Y. Vol. I, 724; 4th Kent, (5th ed.) 280, 412 Stat. of Dist.

⁹ Trower v. Butts, 1 S. & Stu. 181.

¹⁰ Robinson v. Hardcastle, 2 Bro. C. C. 344.

¹¹ Barnes v. Allen, 25 Ind. 222.

A bequest to the two oldest children of A., means the two oldest at the death of the testator. The reference points to age, not names;¹ and where there is a devise to children as a class, those by different marriages will take, especially if there is a gift over on default of issue.²

Representation is not allowed, in Connecticut, beyond the degree of brothers' and sisters' children.³ In North Carolina, a devise to a class operates at the testator's death. But, where there is a preceding life estate, all born into the class during the life estate, participate; and those who die during the same period do not lose their interests.⁴

A mistake in the number of "children" referred to in a will, is generally unimportant. If, therefore, the testator refers to A.'s three children, whereas he has four or five, all will, nevertheless, take. If the number specified be that of the children living at the date of the will, none born afterwards can take.⁵

In *Langston v. Langston*,⁶ the House of Lords raised an estate tail by implication in an eldest son, though he was not mentioned at all in the will, while the second, third, fourth, and *other* sons were. "Other" was held to comprise the eldest son. This is, perhaps, the most strange decision on record. Had the House held the omission of the word "first" to have been caused by mistake, their judgment would have been rational, though not legal. But to imply an estate from an *et cetera*, while there was a palpable omission

¹ *Miles v. Boyden*, 3 Pick. 213.

² *Crotchett v. Taynton*, 1 Russ. & My. 541; see *Stavers v. Barnard*, 2 Y. & C. C. 539.

³ See *Cooke v. Catlin*, 25 Conn. 387.

⁴ *Mason v. White*, 8 Jones. Law, 421; *Simson v. Smith*, 6 Eq. 347.

⁵ *Adams v. Logan*, 6 Mon. 175; *Vernon v. Henry*, 6 Watts, 192.

⁶ 8 Bligh, N. S. 16.

of the name of the eldest son from the place where it ought to be, seems as strange as it is entirely opposed to many of the rules of the courts in construing devises strictly. Giving an interest to persons unnamed is, however, no compensation, on the average, to those who are named by testators, but despoiled by the law.

"Younger children" are to be ascertained only when the portions are payable, if the gift proceeds from a parent. If a stranger is the testator, they are to be ascertained at his death.¹ One who is then a younger child is not excluded by becoming elder afterwards.²

Younger children mean those who do not take the family estate, whether they are younger or not. Thus, the eldest son, if unprovided for, may take under the description of a younger child. Yet, this rule does not apply if the testator is not a parent, but a stranger. A "youngest child," also, sufficiently indicates an only child.

In *Parkman v. Bowdoin*,³ the word children was construed to mean issue or heirs of the body. However, there is a great indisposition in American courts to extend the application of the rule in *Shelley's* case under wills, or even to adopt that rule to the extent allowed in England.

The word issue frequently means children, especially where "issue" are substituted for their parents,⁴ and they are directed to take their "parents'," or their "father's" or "mother's" shares.⁵

In a devise with power in trust to convey "to any

¹ *Miles v. Boyden*, 3 Pick. 213.

² 2 Jarm. 119.

³ 1st Circ. (Mass.) 1833; 1 Sumn. 359.

⁴ *Merrymans v. Merrymans*, 5 Munf. 440.

⁵ *Buckle v. Fawcett*, 4 Hare, 536.

of the male descendants of any family of the name of D. and their heirs," the word family was held to mean children who took individually *per capita*.¹ The phrase "legal representatives" also sometimes means children.²

The rule in Wild's case is, that a devise to one and his children gives the parent an estate tail, if he has no children at the time of the devise,³ but, if he has children then, he takes jointly with them. In a devise to A. to hold "to him, his children, or grandchildren" A. was held to take an estate tail, as he had no grandchildren at the date of the will, though he had children.⁴ This ruling is sound, since the phrase "or grandchildren" showed that the word children was not a term of purchase or designation of individuals. The case is precisely similar to Wood *v.* Baron.⁵ The rule in Wild's case is not applied in favor of after-born children, if those living at the time of the will shall die.

§ 5. *Illegitimate children.*

It is sometimes hard to determine whether a description of a person is partly erroneous, or points to an illegitimate relative.⁶ The maxim which presumes all past events to be legal—*omnia præsumuntur*—is often applied to help the interpretation of such a passage. The word children, for instance, standing alone, means only legitimate children.⁷ A like rule

¹ Dominick *v.* Sayre, 3 Sandf. 555.

² Phyfe *v.* Phyfe, 3 Bradf. 45.

³ Nightingale *v.* Burrell, 15 Pick. 104-114; see Carr *v.* Estill, 16 B. Monroe (Ky.) 309.

⁴ Wheatland *v.* Dodge, 10 Met. 502.

⁵ 1 East, 259.

⁶ James *v.* Smith, 14 Sim. 214.

⁷ Wilkinson *v.* Adams, 1 V. & B. 422.

applies to the terms "son," "issue," "relations," &c.¹ The last term is also construed to mean next of kin, within the meaning of the statute of distributions. If held to mean all relations of the donee, the gift would be void for uncertainty and indefiniteness.

The presumption implied in the maxim quoted excludes illegitimate children, if there are or ever can be any legitimate who can take the gift.² "The question comes round to this," says Lord Eldon, "whether it is possible to say he could mean at the time of making that will any but illegitimate children."³

Illegitimate children, however, will take the gift, if their parent is dead at the date of the will, and this fact is known to the testator.⁴

Illegitimate children or other similar relatives never take under a gift to children or other relatives, if the testator could possibly mean any but illegitimate.⁵ An impossibility of this kind, indeed, occurs, if the parent is believed by the testator to have died and have left none but illegitimate children, or, at most, but one legitimate child. The illegitimate children take in such a case. They will also take by name as persons designated. But, whenever they can be excluded without doing violence to the context, the courts will do so.

In *Edmunds v. Fessey*⁶ the testator gave a legacy to "the sons and daughters of A. B. living at my death." There were two legitimate and one illegitimate son and one illegitimate daughter of A. B. living at the time of the testator's death. Sir John Romilly, M. R., admitted the illegitimate daughter, but excluded the illegitimate

¹ *Id.* 468.

² *Kenchel v. Scafton*, 2 East, 530.

³ *Wilkinson v. Adam*, *ut. sup.*

⁴ *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419; *Gill v. Shelley*, 2 R. & My. 336.

⁵ *Wilkinson v. Adam*, 1 V. & B. 461, 468.

⁶ 7 Jur. N. S. 282.

son. His Honor had no alternative according to the settled rules respecting the admissibility of illegitimate children. The decision may appear to have turned on the accident of the event. But, this cannot affect the principles of interpretation. The testator might have contemplated the possibility of the very event which happened.

An illegitimate child, indeed, cannot take under a general description, as "such other child that may be born of my house-keeper."¹ The case of *Edmunds v. Fassey*, however, would be decided differently in America, where all the illegitimate children would probably, under the circumstances, be admitted to take.

Under a gift to children, an illegitimate child can only take when recognized as a child, and when there are no other children. But, if there is one legitimate child, the illegitimate child will still take under a gift to children in the plural. -

In *Bayley v. Mollard*,² the testator give a legacy to the illegitimate child of W.; yet, such a child got no share in a residue given to the children of W. This case ignored the sense in which the testator obviously used the term "children" in his will. On the other hand, in *Wilkinson v. Adam*,³ the future illegitimate children of a testator were let in, although this devise savors of immorality, and though legitimate children might possibly claim under the bequest in question.

Legitimate and illegitimate children never can both claim under the same bequest, and if there is at the date of the will a possibility that both may claim, the illegitimate can never take. If they do, then the legitimate cannot take, unless all are persons designated.

¹ *Medworth v. Pope*, 5 Jur. N. S. 996; see *Edmunds v. Fassey*, 7 Jur. N. S. 282.

² 1 Russ. & Myl. 581.

³ 1 Ves. & Bea. 422.

In *Shearman v. Angel*,¹ a testator gave a bequest to his mother for life, remainder to her children, and gave another bequest to his sister. The testator and his sister were illegitimate children of the "mother." The sister was considered not to be included in the devise to the "children." This decision was harsh, when we consider that the testator was himself illegitimate, and did not expressly exclude his "sister" from the second bequest.

A testator devised real estate to his two daughters, A. and M., "meaning and intending that all the children that have been or may be born of their bodies shall become heirs to the same." At the time the will was made, both daughters had illegitimate children. It was held that the daughters took in fee, and that the illegitimate children were only to be regarded as their heirs equally with legitimate ones.²

A bequest to an unborn illegitimate child, the mother being described, is valid,³ unless the paternity of the child is made a qualification of its taking the bequest. It is then void, the bastard being necessarily by law nobody's child—*filius nullius*.

§ 6. *Family.*

The term "family" primarily means children, as regards bequests. Therefore, a bequest to A.'s family does not comprise A. or his wife.⁴

In devises of realty, "family" means heirs, or heirs of the body. Of course, the context may show that the testator meant by family a whole household, including servants, or his next of kin.

The word "family," however, will often be construed

¹ 1 Bail. Eq. 351.

² *Hughes v. Knowlton*, 37 Conn. 429; *Woodstock v. Hooker*, 6 Conn. 55; *Welles v. Allcott*, Kirby, 118.

³ *Pratt v. Flamen*, 5 Har. & Johns. 10.

⁴ *Barnes v. Patch*, 8 Ves. 604.

to mean relatives, rather than children,¹ just as where a testator uses the words issue and children synonymously, the meaning of the term issue will prevail.² The general meaning of a term obtains, of course, in wills only where the terms in question are not interpreted by the context.³

The word family may of course, therefore, be so qualified by the context as to mean heirs, or even relatives by marriage.⁴

If the interest was mere personalty, the term, if standing alone, was formerly void for uncertainty.⁵

If the interest was composed of both realty and personalty, the same result sometimes followed.⁶

All these decisions, indeed, may be considered as overruled at the present day.

If the interest was realty, the term family was rarely or never void for uncertainty, but was rather construed to mean heir.⁷

The term "house" has always had the same signification,⁸ when used with a personal, not real, reference. A like rule was applied to mixed realty and leaseholds.⁹ However, it is certain that at the present day, even in England, the term family would never be held void for uncertainty, even as to bequests of pure personalty.

¹ *Crump v. Colman*, 9 Ves. 319.

² *Wyth v. Blackman*, 1 Ves. Sen. 196; *Merrymans v. Merrymans*, 5 Munf. 440.

³ See *Cuishan v. Newland*, 2 Scott, 105, and *Jennings v. Newman*, 10 Sim. 219.

⁴ 2 Jarm. 19; 2 Williams on Ex. 2d. Am. ed. 818, 819; see 2 Story Eq. Jur. § 1065 b, § 1071.

⁵ *Harland v. Trigg*, 1 B. C. C. 142; *Rolinson v. Waddelow*, 8 Sim. 134.

⁶ *Doe d. Hayter v. Joinville*, 3 East, 172.

⁷ *Connden v. Clerke*, Hobart's Rep. 29; *Wright v. Atkyns*, 17 Ves. 255; see 2 Story Eq. Jur. § 1071.

⁸ *Chapman's case*, Dyer, 333 b. ⁹ *Wright v. Atkyns*, 17 Ves. 255.

The word family,¹ or relations², used in a devise of both realty and personalty will receive the same construction as to both kinds of property,³ unless the context declares or implies to the contrary.

§ 7. *Next of kin.*

The phrase "next of kin" means the nearest in blood, including the father and mother of the propositus, but excludes a husband, wife, and those who claim by representation.⁴ For instance, a brother, but not the children of a deceased brother, would claim under a gift to next of kin.⁵ This decision has not been yet overruled—a contingency now not to be thought of. Legislative interposition alone ought ever to be invoked for the purpose of altering a rule fortified by numerous cases.

The phrase "next of kin," therefore, means "the nearest blood relations," as father, mother and children of the propositus, and excludes those entitled by representation. These would be admitted under the statute of distributions, while the children would exclude the parents. Next of kin also take as joint tenants, while next of kin under the statute take as tenants in common.⁶ But a reference to next of kin, *as if I had died intestate*, means the next of kin according to the statutes. "Next of kin" does not comprise relations by affinity.⁷

The rule in *Spink v. Lewis*,⁸ which does not defer the period of ascertaining next of kin until the interest falls into possession, though the testator gives it to next of

¹ 17 Ves. 255.

² 19 Ves. 299

³ *Ridgway v. Munkittrick*, 1 Dru. & War. 84; see *Carter v. Bentall*, 2 Beav. 551.

⁴ *Wright v. Trustees of Method. Epis. Church*, 1 Hoff. Ch. 213.

⁵ *Elmesley v. Young*, 2 Myl. & Keen, 780.

⁶ *Elmesley v. Young*, 2 My. & K. 780.

⁷ *Nichols v. Savage*, 18 Ves. 52.

⁸ 3 Br. C. C. 355.

kin "living at the time the estate comes into possession," is justly disapproved by Judge Redfield.¹

The rule in *Gundry v. Pinniger*, which recognizes only the next of kin at the time of the testator's death, is thought by Mr. Hawkins² not to apply so strictly to relations. The cases support this view.³

"Next of kin of the male line" means merely next of kin *ex parte paterna*.⁴

A gift to next of kin *ex parte materna* may go to one who is also next of kin *ex parte paterna*, unless the male side is excluded.⁵ If it is, then the next of kin after the former take. The phrase "next of kin by way of heirship" means, as regards realty, the heir, even though he be not next of kin.⁶

§ 8. *Relations.*

Relatives mean next of kin, according to the statute of distributions.⁷ This rule applies to gifts of realty as well as of personalty, yet the term does not include a wife. In *Storer v. Wheatly*,⁸ a bequest to "nearest relations or connections according to the laws of the commonwealth" was held, in Pennsylvania, not to include testator's widow. The term "relations" never includes husband or wife or relations by affinity. The case of *Withy v. Mangles*⁹ is an authority for the position that "next of kin" will be computed by the degree of their relationships, even though some of them might not take

¹ Vol. II, 90.

² P. 105.

³ See *Lees v. Massey*, 3 De G. F. & J. 113; *Tiffin v. Longman*, 15 B. 275.

⁴ *Boys v. Bradley*, 10 Hare, 389.

⁵ *Gundry v. Pinniger*, 14 Beav. 94.

⁶ *Williams v. Ashton*, 1 Johns. & H. 115.

⁷ *Morton v. Barrett*, 22 Me. 257.

⁸ 1 Penn. Stat. 506.

⁹ 4 Jurist, 717.

under the statute of distributions. In the case cited, the parents as well as the children of the testator participated in a gift to next of kin.

The word "near," "deserving" or "poor," prefixed to "relations," does not alter the sense of the latter term. But the phrase "nearest relations" means next of kin simply, and without representation. "To my next of kin as if I had died intestate" is only the same as "to my next of kin," and does not include the testator's widow.¹

A gift to poor relations is sometimes construed as a charitable use, though confined to next of kin. If such a gift, therefore, consists of realty, it will be void by statute in England and in some of the States.²

A gift to relations of one's *name* means a gift to persons of his *stock* or family. Therefore, a married sister will take, unless the testator really meant that his name should be borne by the donee at the time of the vesting of the interest. In the latter case, the assumption of the name by legal license is of no avail.³

If the testator specifies a certain number of his "nearest" relatives, the description will be applied irrespectively of the statute.⁴ The case cited also determines that, where the gift is to "relatives or connections," connections by affinity will not take until the list of blood relations is exhausted. Under a gift to "such of my nearest relations as my executors shall think the greatest objects of charity," only those entitled under the statute of distributions will take in New Hampshire.⁵

"Relations" mean those existing at the time of testator's death. A like rule applies where a life inter-

¹ Smith v. Campbell, 10 Ves. 400.

² Leigh v. Leigh, 5 Ves. 92.

³ Varrell v. Wendell, 20 N. H. 431.

⁴ See *infra*, c. 26, § 5.

⁵ Elms v. Pentz, 3 Bradf. 382.

est is given to a stranger, remainder to the testator's next of kin. The gift vests in interest at the testator's death, though not in possession until the death of the life tenant.¹ "Next of kin" of another, who is dead or dies before the testator, are reckoned at the testator's death, but, if the testator dies before him, then at his death, no matter whether the gift vests then in possession or not. If the gift be to the next of kin of B. living at a certain time, still none can take but those who were next of kin at the time of the testator's death, and who survive the stated period.

If there be a gift to A. for life, remainder to A.'s next of kin, and A. is the testator's sole next of kin, then it is alleged that these are reckoned at A.'s death, and not at the testator's, contrary to the general rule.² But, it is doubtful whether this exception to the general rule of vesting at the testator's death applies at all to realty, as the law is greatly opposed to suspensions of interests in realty. Lord Hardwicke, in *Pyot v. Pyot*,³ thought that in cases of executory devise the period of vesting was the period of distribution, but Jarman doubts the force of this case. Mr. Hawkins⁴ considers that the period of vesting is not affected by the fact that the tenant for life is the testator's sole next of kin, and cites *Halloway v. Halloway*,⁵ *Ware v. Rowland*,⁶ and other cases in support of his view. The later cases have settled this point as Mr. Hawkins alleges.

A charitable gift to relations, however, is not confined to those within the statute.⁷ Therefore, also, a power of selection of relations may be exercised in favor of those outside the bounds of the statute.⁸ But a power of distribution is confined within those limits.

¹ 2 Jarm. 52.

² 2 Jarm. 60.

³ 1 Ves. Sen. 335.

⁴ P. 100.

⁵ 5 Ves. 399.

⁶ 2 Phill. 635.

⁷ *Attorney-General v. Price*, 17 Ves. 371.

⁸ *Pope v. Whitcombe*, 3 Mer. 689.

The donee of any power to appoint amongst next of kin may appoint amongst those who are such at the period of distribution.¹

By the phrase "relatives or connections" substitution may be intended; but connections by affinity will not take until the class of relatives by blood is first exhausted.²

The court will never give a term a secondary meaning if such will render the gift void,³ but will readily deviate from the primary sense in order to effectuate the intention. Thus, "children" may comprise grandchildren,⁴ and more remote descendants. "Cousins," however, means merely first cousins. The phrase "brothers and sisters" comprises those of the half blood, but relations by affinity are, as a rule, not regarded as comprised under general terms.

A devise to one's wife means only the person who is the testator's wife at the date of the will.⁵ A devise to "the husbands of my daughters" will probably be construed in the same way.⁶

A gift to "my servants," it is thought,⁷ will extend to those in testator's service at date of the will, though they leave it before his death. Judge Redfield⁸ prefers to comprise by such a phrase only those who are in the testator's service at the time of his decease, no matter whether they were his servants at the time of his making the will or not. The best rule, perhaps, would be not to admit those who entered testator's service recent-

¹ *Finch v. Hollingsworth*, 21 B. 112.

² *Ennis v. Pentz*, 3 Bradf. 382.

³ *Crooke v. Brooking*, 2 Vern. 107.

⁴ *Prowett v. Rodman*, 37 N. Y. 42; see *Jackson v. Staats*, 11 Johns. 337, 351; *Hallowell v. Phipps*, 2 Whart. 376.

⁵ 2 Redf. 28, n; *Lady Lincoln v. Pelham*, 10 Ves. 166.

⁶ *Bryant's Trusts*, 2 Sim. N. S. 103.

⁷ 1 Jarm. 306.

⁸ Vol. II, 96.

ly before his death, nor those who were then serving elsewhere, but to confine the bequest to such of testator's servants as were in his service both at the date of the will and at the time of his death. The term "servants" means *domestics* hired at a *yearly* stipend. Of course, if a word occurs frequently in a will, the term will be throughout interpreted in the same manner, if there is nothing in the context to the contrary.¹ *Aliter* if the context is adverse to such an interpretation.²

§ 9. *Stocks and individuals.*

"Issue" take as joint tenants. If the gift is to them as tenants in common, they take *per capita*.³ A gift to the children of several persons, as of A. and B., is distributed amongst them *per capita*, and not *per stirpes*.⁴ A like rule applies to a gift to one, and the children of another standing in the same relation to the testator, as "to my brother A. and the children of my brother B." This rule, however, will not apply if the income is applicable *per stirpes*. Other slight indications of intention will neutralize the legal presumption. The rule is somewhat irrational. It is doubtful whether it is recognized in America.⁵

Though, under a gift to the children of A. and B., as tenants in common, the children take *per capita*,⁶ yet they will take *per stirpes*, if A. and B. take life estates.⁷ The doctrine in *Arrow v. Mellish* seems sound, yet it is so limited, if not infringed upon, by other cases,⁸ that no

¹ *Ridgway v. Munkettrick*, 1 Dru. & War. 84.

² *Carter v. Bentall*, 2 Beav. 551.

³ *Davenport v. Hanbury*, 3 Ves. 258.

⁴ *Ex parte Leith*, 1 Hill Ch. 153.

⁵ See *Alder v. Beall*, 11 Gill & J. 128; *Tissel's Appeal*, 27 Penn. St. 55.

⁶ *Lincoln v. Pelham*, 10 Ves. 166.

⁷ *Arrow v. Mellish*, 1 De G. & Sm. 355.

⁸ See *Abrey v. Newman*, 16 B. 431.

great reliance can be placed on it, except where the context is the same as in the instrument there adjudicated upon.

As the phrase, "to be divided equally among the children of A., B., and C." gives *per capita*,¹ so a like rule applies where the gift is to persons standing in various degrees of relationship to the testator.²

Under a devise of a homestead to testator's three daughters, A., B., and C., and the children of his son, D., the devisees were held to take *per stirpes*.³ Under a devise of the testator's estate,⁴ "one-fourth part to be given to the families of G. H., W. B. B., and A. B.; to those of their children that my wife shall think proper, but in a greater proportion to F. P. H., than to any other of G. H.'s children; to E. B. in a greater proportion than any other of A. B.'s children; and the balance to be given to the families of C. and J. T. G.'s children, in equal proportion," it was held that the children of C. and J. T. G. took *per stirpes* and not *per capita*, and that the property devised to them was to be divided into two equal parts, one moiety to be assigned to each family.

"I wish my personal and real estate to be appropriated equally to the benefit of my wife, E., and of my children,"⁵ naming two. It was held the legatees all took *per capita*, and that each was entitled to one-third of the residue, after the widow's dower was satisfied. A testator bequeathed the residue to his brother A., and to the male heirs of his deceased brother B., with the direction that C., one of the sons of B., should re-

¹ Collins v. Hoxie, 9 Paige, 81.

² Murphy v. Harvey, 4 Edw. 131; see Bunner v. Storm, 1 Sandf. Ch. 357.

³ Lyon v. Acker, 33 Conn. 222; see Leland v. Adams, 12 Allen, 286.

⁴ Walker v. Griffin, 11 Wheat. 375.

⁵ Seabury v. Brewer, 53 Barb. 662.

ceive "no part whatever, but the same to be divided among the other male heirs of said B., deceased."¹ It was held that the distribution should be *per stirpes* and not *per capita*.

Under a bequest to "the descendants of my three uncles," the children of the uncles take *per capita*, and not *per stirpes*;² and, under a bequest "to the heirs of my late husband, and to my heirs equally," each class of heirs takes, *per stirpes*, one-half of the sum bequeathed.³

Next of kin take *per stirpes*.⁴ As to distribution in Connecticut, see *Cook v. Catlin*.⁵ Relations, however, take *per capita*, if they happen to be all of the same degree, though descended, say two or more from one stock, and one only from another.

Toller in his work "on Executors," and Mr. Justice Williams in his comprehensive treatise "on Executors and Administrators," have laid down that, "If a father have three children, John, Mary, and Henry, and they all die before the father, John leaving, for instance, two children, Mary three, and Henry four, and afterward the father die intestate, in that case all his grandchildren shall have an equal share, for, as his children are all dead, their children shall take as next of kin. Such, also, would be the case with respect to the great grandchildren of the intestate, if both his children and grandchildren had all died before him." Sir John Wickens, however, *in re Ross's Trusts*,⁶ has held that the passage cited is not law, and is a mere dictum transferred into

¹ *Clark v. Lynch*, 46 Barb. 68.

² *Brown v. Brown*, 6 Bush, (Ky.) 648.

³ *Bassett v. Granger*, 100 Mass. 348.

⁴ *Tillinghast v. Cook*, 9 Met. 143, 147.

⁵ 25 Conn. 387.

⁶ Referred to in Albany Law Journal, Vol. V, 135.

Mr. Justice Williams' treatise from Toller, and that "it appears to stand there on the authority of Toller, since the only cases cited are those cited by Toller, and that these are irrelevant." In the case supposed by Toller, therefore, the issue take *per stirpes*, and not *per capita*.

CHAPTER XXIV.

§ 1. *Nature of legacies.*

A testamentary gift of land is termed a devise; of personalty, a legacy or bequest. The term legacy includes annuities and all *personal* charges,¹ unless the context is to the contrary. A bequest, however, of an annuity or clear yearly sum, is a gift free of legacy duty.² The phrase "all the legacies before mentioned" will not include a portion.³ "An equal share of my property" applies to the interest which the donee is to take, as well as to the subject of the gift.⁴ "Equally to be divided" relates to the quality and not to the quantity of interest given, and creates a tenancy in common.⁵ In *Eagle v. Emmet*,⁶ it was held that a policy of insurance does not pass under a general devise of personal estate, but that the representatives of the testator take such moneys as may accrue from the policy in trust for the parties interested in the property insured.

It was held in *Ennis v. Smith*,⁷ that a bequest of "all my effects" may be so controlled by the context and surrounding circumstances as to deprive the phrase of its full natural effect. Parol evidence, however, would not be admitted in England of the meaning of the

¹ See *Heath v. Weston*, 3 D. M. & G. 601.

² *Pridie v. Field*, 19 B. 497.

³ *Sholl v. Sholl*, 5 Barb. 312.

⁴ *Lawrence v. Lawrence*, 1 Edw. 241.

⁵ *Sweet v. Geisenhainer*, 3 Bradf. 314.

⁶ 4 Bradf. 117.

⁷ 14 H. 400; *Smith v. Bell*, 6 Pet. 68.

phrase, even in more peculiar circumstances than existed in the case of *Ennis v. Smith*. Indeed, there seems to be no ground, in point of principle, for holding that the phrase admits of any basis whatever for the adduction of parol evidence. Such evidence is admitted when the ambiguity relates to a concrete subject or object, and not to abstract phrases, such as effects, property, or wealth in general.

In deciding on the validity and construction of purely personal legacies, the court follows the analogies of the civil law, but, as regards legacies charged on land, these are interpreted according to the rules of the common law. For, formerly, personal legacies were administered by the ecclesiastical courts, which used the civil law. But, devises of land were construed by the common law courts since the reign of Henry the Eighth.

No suit lies at common law by a legatee against an executor, unless he has assented to the legacy, and it is specific; because until the testator's debts are paid, it is not clear that the legatee has any claim.¹ This is another advantage which a specific has over a general legatee, who, *semble*, can never sue at common law, even though the executor has assented to his bequest.² These rules of law are now altered in many of the States. But, where no statute applies, the rules of the common law, of course, still subsist, unless nullified by the course of adjudication. Where there is an actual trust, express, implied, or constructive, or the legacy is charged on land, equity will assert an exclusive jurisdiction, and in all other cases the court has a concurrent jurisdiction, except where statute law provides to the contrary.

A testator is presumed to speak of the state of his

¹ 2 Bl. Com. 512.

² Story, Eq. Jur. 591.

personalty as existing at the time of his death, unless there is something in the context on the nature of the subject matter, or of the provision, to preclude this presumption. Therefore, where a testator releases A. from all notes, charges, or advances, this means such securities as may be due by A. to the testator at his decease.¹ Bequests, indeed, are often construed as if the will spoke from its date. A codicil, however, makes the will always speak from the date of the codicil, unless a contrary intention is apparent.²

§ 2. *Legacies classified.*

Legacies are either general, demonstrative, or specific. A legacy is general when it is a sum of money or a gift of an article, such as a horse or ring, shares or stocks, without further description. General gifts of the latter kind, however, are rare. They are usually specific, such as "my shares, ring, horse," &c. A demonstrative legacy is a gift of a general legacy to be drawn from a specific fund. A specific legacy is a gift of a thing in specie, and not of its value, as "my brown mare," "my gold watch," "my leasehold" or "my freehold at Greenacre." Such a legacy is ear-marked, and is not drawn from a larger fund of a different kind, though, of course, it may form part of a larger specific fund of the same nature. Thus, a bequest of 1,000 bonds out of my five-twenty bonds or consols, is specific.³ But, a bequest of \$1,000 out of my five-twenty bonds, is demonstrative. Legacies may thus be specific, although no suit in equity might lie for a

¹ *Van Vechten v. Van Vechten*, 8 Paige, 104; *Collin v. Collin*, 1 Barb. Ch. 630.

² *Van Alstyne v. Van Alstyne*, 28 N. Y. 375; 1 *Williams on Ex'ors*, 175, 1 Hill, 590.

³ *Mullins v. Smith*, 1 Dr. & Sm. 204.

specific performance on a contract to transfer the property bequeathed. The term specific, therefore, as applied to a legacy, denotes a gift that is capable of identification or an ear-mark, and which is, in point of fact, actually identified by the testator for the purpose of transmission to the legatee. A demonstrative legacy is a general legacy payable, primarily, out of a specific fund.¹ It is a legacy of quantity, of the nature of a specific legacy, as of so much money, with reference to a particular fund for payment. The term demonstrative is derived from the civilians.² If the legacy is a specific part of a larger specified fund, it is, of course, specific, and not demonstrative.²

The most beneficial kind of legacy for a donee is a demonstrative gift. Except that it does not carry interest from the date of the testator's death, it unites all the good incidents of specific with those of general legacies, inasmuch as; like the latter, it is not cancelled by ademption of the property, but is still payable out of the general assets, while, unlike general legacies, it does not abate on a deficiency of assets, except so far as it is payable out of the non-specific personalty. It is, however, of course, subject to the claims of creditors if the general assets are insufficient to satisfy their claims.

A specific legacy may be defined to be the gift, by will, of one or more articles, the render of which alone will satisfy the literal terms of the bequest. If the gift be of an abstract value, such as money or cash, a tender of the amount is a literal compliance with the direction in the will, and this request can be satisfied by the render to the donee of any pieces of coin

¹ *Ludlam's Estate*, 1 Harris, 188; *Walls v. Stewart*, 4 Harris, 281.

² See *Malone v. Mooring*, 40 Miss. 247; *Millens v. Smith*, 1 Dr. & Sm. 204; *Gilmer v. Gilmer*, 42 Ala. 9; *Manice v. Manice*, 1 Lans. (N. Y.) 348.

amounting in value to the sum bequeathed. But, a gift of "my brown horse," "the piano I bought at Clinton Hall," "my shares in the Harlem Railway Company," "the money in my green silk purse," &c., is specific, and points to certain articles the render of which alone can be a strict compliance with the testator's direction.

A specific legacy is always prefixed with a definite article or pronoun, such as *the* horse I bought from A. B., or *my* brown horse.¹ A bequest of "as many of my horses as will amount to \$800," is specific, for it can be made specific. *Id certum est*, &c. A bequest of "my brown horse" when the testator has only a gray one, is still specific. If he has two brown horses, parol evidence is admissible to show which was intended.

A specific legacy entitles the legatee to demand the particular article bequeathed, and not merely its value at the executor's choice. Therefore, where there is a bequest not of a particular fund, but of a sum out of it, this indicates a conversion of the fund by the executor for the purposes of the payment, rather than a specific render of the fund or any part thereof. So, a sum of money given out of a debt due to the testator, is general; *aliter*, if the gift was of the debt itself.²

A gift of money may be specific, if ear-marked, or particularly described, as the \$1,000 in my drawer, &c., or in the hands of C.,³ or the amount ordered under a certain decree of court,⁴ or the money in a certain bureau.⁵

A gift of \$50 apiece to A., B., and C. is general. So is a gift to invest in government securities, shares, bank

¹ 1 Roper, 193; see *supra*, Part I, Prop. III, *et seq.* as to inaccurate description.

² Sidebotham v. Watson, 11 Hare, 170; Ellis v. Walker, Amb. 309.

³ 1 Atk. 508; Ellis v. Walker, Amb. 309.

⁴ See Gilbreath v. Winter, 10 Ohio, 64.

⁵ Lawson v. Stitch, 1 Atk. 507.

stock, or even land.¹ The object² or motive of a gift cannot render it specific. The phrase "all I do³ or may⁴ possess" in the funds at my death confers a specific gift. The objection that a non-existing article cannot be adeemed, is frivolous. For, as a matter of fact, the will does not operate until the time of the testator's death, in respect even to specific gifts of already acquired property. But, if the testator, after making his will, acquires property of the kind bequeathed, he can afterwards adeem it, and, if he has it not, he cannot effectually bequeath it either generally or specifically.

A bequest of the horses the testator has in his stable, of the plate or library at a certain house, is specific.⁵ A gift of \$5,000 now out on mortgage is general, but a gift of *my* \$5,000 mortgage specific.⁶ A bequest of \$100, "or the value thereof in other property," is general, being evidently not specific, nor involving any choice of specific articles.⁷ But, where there was a bequest of \$5,000 consols, with a direction that, if the consols belonging to the testatrix did not reach that amount, the executor should raise the balance, the gift was held to be specific.⁸

The courts lean against construing legacies as specific. Therefore, a legacy of stock in general terms is not specific, even though the testator has stocks of the kind mentioned. The gift is merely equivalent to a direction that the executor purchase so much stock, if

¹ *Gibbons v. Hills*, 1 Dick. 324.

² 1 Roper, 203.

³ *Auther v. Auther*, 13 Sim. 422.

⁴ 1 Roper, 218; *Stephenson v. Dowson*, 3 Beav. 342.

⁵ *Stevenson v. Dowson*, 3 Beav. 342.

⁶ *Le Grice v. Finch*, 8 Mer. 50; *Chaworth v. Beech*, 4 Ves. 555; *Walls v. Stuart*, 16 Penn. St. 275, 281.

⁷ *Fagan v. Jones*, 2 Dev. & Batt. Eq. 69.

⁸ *Townsend v. Martin*, 7 Hare, 471.

the testator have it not at his decease.¹ In *Jefferys v. Jefferys*,² however, a gift of bank stock of the precise amount then owned by the testator, was held to be specific; in *Walton v. Walton*,³ a bequest of all the testator's interest in thirty shares in the Bank of the United States was held to be of the same nature; and in *Norris v. Thompson*,⁴ a bequest of bank stock shares was held to be specific, although the testator held a greater number of the shares in question.

The following gifts of debt are specific:—A bequest of the debt or “money now due me by A.,” or “in the hands of A.,” or “the money due me on the bond of A.,” or “my mortgage,” “my East India bond,” or “my note from D.”⁵ A bequest of part of a debt, if in similar terms, will be equally specific. But, if the gift is not of the fund itself, or any part thereof, though it is referred to as a source of payment or security for the legacy, the gift is demonstrative. This construction will prevail in doubtful cases, owing to the leaning of equity against specific gifts.⁶

Personal annuities are mere general legacies.⁷ But a rent charge or annuity charged only on land is specific. A general legacy, however, though charged on land, is not specific;⁸ neither is an annuity that is only primarily charged on land specific. If a testator charges his real estate with a sum of money, and then bequeaths that sum, this is a specific legacy, being equivalent to the capital sum of an annuity charged only on land. The question in all such cases is whether the gift is only

¹ *Webster v. Hale*, 8 Ves. 410.

² 3 Atk. 120; see *Webster v. Hale*, 8 Ves. 410.

³ 7 Johns. Ch. 258.

⁴ 1 C. E. Green, 218, 542.

⁵ 1 Rep. 227.

⁶ 1 Rep. 234.

⁷ *Lewin v. Lewin*, 2 Ves. Sen. 416.

⁸ *Creed v. Creed*, 11 Cl. & F. 491; s. c. 1 Dr. & W. 416.

primarily or solely charged on the property in question. If charged solely upon it, the gift is specific.¹

Annuities charged on land are thus usually specific, while a personal annuity for life is general.² A legacy of the whole or part of the proceeds of real estate is equivalent to a gift of an interest in land, and is, therefore, specific, though a charge of legacies on real estate is not thereby rendered specific.³

A gift of particular stocks or annuities, or of stock or annuities or particular funds is still general,⁴ even though the testator own such, unless he declares his intention expressly or by implication to bequeath such identical stock or part thereof. Unless he is thus explicit, the coincidence in amount of the bequest and of the value of the stock owned by him will not render the gift specific.⁵ The case of *Avelyn v. Ward*,⁶ but not that of *Ashton v. Ashton*,⁷ is inconsistent with *Purse v. Snaplin*. Roper successfully reconciles *Ashton v. Ashton* with *Purse v. Snaplin*, upon the ground that in the former case there was a trust to sell the shares or annuities in question, and this trust would be *insensible* unless the legacy was specific.

A bequest of stocks or shares will pass any of the denomination possessed by the testator at the time of his decease,⁸ and the legatee will be entitled to elect, if the number bequeathed be less than the amount owned by the testator. Such a bequest is general unless the shares are referred to in a specific manner as "my shares," or are otherwise identified.⁹ The case of *Av-*

¹ See 1 Rop. 197, 198; *Dickin v. Edwards*, 4 Hare, 273.

² *Hume v. Edwards*, 3 Atk. 693.

³ See *Creed v. Creed*, 11 Cl. & Fin. 491.

⁴ 1 Rop. 215.

⁵ *Purse v. Snaplin*, 1 Atk. 415.

⁶ 1 Ves. Sen. 420.

⁷ 3 P. Wms. 384.

⁸ See *Trinder v. Trinder*, L. R. 1 Eq. 695.

⁹ *Robinson v. Addison*, 2 Beav. 515.

elyn v. Ward,¹ which is to the contrary, seems to have been overruled.

A gift of money "in stock," "out of stock," "out of the dividends of stock," or of a personal annuity out of the dividends of stock, is general, and is not a gift of any specific stock.² For, the thing bequeathed is *money* and not stock.³

A gift of all the stocks the testator has or will have at the time of his decease is specific. For, that is specific which can be rendered such. *Id certum, &c.*⁴ A bequest of a certain amount "of the stock which I hold" in a specified corporation, is a specific legacy, and should be paid out of bonds of the estate, of the specified character, without abatement. But, a bequest "of five thousand dollars in railroad bonds" is a general legacy, and, if there is any deficiency of such bonds, it must be supplied out of the general assets of the estate.⁵

In Palsford v. Hunter,⁶ the legacy was of the value of securities, which were money bills then in the testator's possession. The money bills were afterwards paid by exchange bills, which remained on hand at the decease of the testator. The gift was held to be specific. Yet the term "value" was as general as a logician or political economist could desire. The case would hardly be followed at the present day. The conversion into somewhat similar securities, and the fact that these remained on hand should not, of course, affect a question of construction, which should be considered independ-

¹ 1 Ves. Sen. 420.

² See Deane v. Test, 9 Ves. 146.

³ 1 Rep. 221.

⁴ See Stevenson v. Dowson, 3 Beav. 342; Richards v. Richards, 9 Price, 219, 230.

⁵ Gilmer v. Gilmer, 42 Ala. 9; see Corbin v. Mills, 19 Gratt. 438.

⁶ 3 Br. C. C. 416.

ently of the event. The case of *Fontaine v. Tyler*¹ is not authority to the contrary, inasmuch as the legacy was virtually alternative, being specific if the testator had the stock bequeathed, and general if he had not. The will itself, in effect, directed that the value of the gift should be interpreted by the event. A similar though not exactly identical alternative provision is found in the case of *Foote*, appellant.²

A direction to invest a certain amount in government securities is a general legacy. But, *semble*, a direction to add to the testator's existing government securities up to a certain amount renders the whole gift specific. The former position, though refined, appears to be founded on the rule that the purpose for which a bequest is given never renders it specific. But, where part of the fund is specific, and the direction is to assimilate the remainder of the gift to the specific portion, the money gift, though apparently general, inasmuch as it comes out of the general assets, yet, seems to be specific in principle, by reference to the existing fund, to which it is attracted.³ Still, general legacies in substitution for specific legacies are not the less general.⁴ In *Taylor v. Martindale*,⁵ a testator bequeathed £10,000 3 per cents., and directed his executors to make up the deficiency, if he should not leave sufficient stocks, but he left £70,000 worth. The bequest was held specific. Here, however, the testator directed that his will should be interpreted by the court, and this constituted the whole gift specific.

As the courts lean against construing a legacy as

¹ 9 Price, 94, 104.

² 22 Pick. 299.

³ See *Taylor v. Martindale*, 12 Sim. 158.

⁴ See *Sparks v. Weedon*, 21 Md. 164.

⁵ 12 Sim. 158.

specific,¹ so, if the gift is of a sum of money, though mentioned as secured by a bond, note, or mortgage, the court will hold the legacy demonstrative.

Therefore, also, unless the gift is in its terms and by construction specific, it is not rendered so by the fact or event. Thus, a legacy of stock is not rendered specific by the fact of the testator's possessing the amount indicated at the time of making the will, or at his decease, unless there is a reference to such, as "my interest in such stocks," or "my shares,"² or some other definite allusion to particular stocks owned or intended to be owned by the testator. A direction that a legacy is not to be considered specific in respect to liability to ademption, however, will not prevent its retaining other specific incidents.³

A legacy of all of one's personal estate is necessarily, *ex vi termini*, general, even though given and limited in settlement with realty. A general bequest of personalty, however, if qualified by a reference to locality, is specific. It is for this reason that a bequest of all one's personal estate at B. is specific.⁴ So, if the testator shows that his intention is that the tenant for life of it should enjoy it specifically,⁵ the gift will be so construed.

In *Dormer v. Burnet*, A. bequeathed to B. "all the goods she brought into her house at D., except what are mentioned in a schedule." There was no schedule

¹ *Mayrant v. Davis*, 1 Desaus., 202; *Warren v. Wigfall*, 3 Desaus., 47; *Smith v. Lampton*, 8 Dana, 69.

² *Tift v. Porter*, 8 N. Y. 516; *Everett v. Lane*, 2 Ired. Eq. 548; overruled, *Davis v. Cain*, 1 Ired. Eq. 304.

³ *Jacques v. Chambers*, 2 Coll. C. C. 435; see *Ludlam's estate*, 13 Penn. St. 188.

⁴ *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Sayer v. Sayer*, 2 Vern. 688.

⁵ *Pickering v. Pickering*, 4 My. & Cr. 289.

found. It was held that the exception was void, but that no goods passed but those in the house at the date of the will. The phrase "now owned or possessed by me" will usually prevent after-acquired property from passing. But, a gift of my library now in B.'s custody has not this restrictive force. The word now in similar gifts of "sundries," or collective bequests, as of a flock of sheep, would probably be construed in the same way, as carrying any subsequent enlargement of the subject-matter of the gift. Accretions, such as bonuses, will pass under a gift of money secured by a policy of insurance,¹ at least in those States where the will speaks from the death of the testator, and the context is not to the contrary.

A charge upon land devised by will of a certain percentage on the value of the land is a pecuniary legacy, and passes to the surviving husband of the legatee.²

Though a general residuary clause is not specific merely because it enumerates some particulars, yet, a bequest of residue in a particular country or county is specific.³ So is a residue of certain stocks, after deducting previous specific bequests.⁴ The maxim *id certum est* applies to such cases.

In *Minor v. Dabney*,⁵ after an enumeration of certain articles, there was a gift of "all the estate not before devised." This clause, however, was construed to include merely articles of the same nature, *ejusdem generis*, as those enumerated, and, consequently not to be a general residuary devise.

Although a tenant for life of a specific bequest, or

¹ 1 Roper, 296; *Courtenay v. Ferrers*, 1 Sim. 137.

² *Gray v. McDowell*, 6 Bush. (Ky.) 475.

³ *Nisbett v. Murray*, 5 Ves. 149.

⁴ *Elwes v. Canston*, 30 Beav. 554.

⁵ 3 Rand, 191.

of a lease, enjoys it *in specie*; a tenant for life of a residue, or of the bulk of a testator's estate, has not the same privilege. The court converts terminable funds into public stocks, in order to equalize the income for the benefit of the tenant for life and the remainder-man.¹ Judge Redfield,² however, thinks the rule in *Howe's case* would not be acted on by the American courts. At all events, the same rules as to requiring security or an inventory from the tenant for life prevail in the American as in the English tribunals.³

Extra dividends or bonuses on shares belong to the tenant for life, and not to the remainder-man; and, if the shares are specifically bequeathed, the bonuses, if declared after the testator's death, belong to the specific legatee, and not to the general personalty.⁴

If a specific legacy is once converted by the testator, it is adeemed, even though the price of it, or the securities into which its price has been converted, continue in his hands.⁵ If a legacy, in terms specific, is not in reality such, owing to the testator's not having the whole interest or amount in the particular interest bequeathed, yet the legacy is construed as specific. Therefore, a bequest of 100 shares in the St. Louis Railway, while the testator has only 20 of such shares at the time of his decease, is good only for the 20.⁶ If he has more than 100 at his decease, only 100 will still pass.⁷ Gifts of specific legacies, however, usually speak from the date of the will.

As a gift of all of a testator's personal estate is

¹ *Howe v. Earl of Dartmouth*, 7 Ves. 137.

² Vol. II, 151.

³ *Covenhoven v. Shuller*, 2 Paige, 122, 132.

⁴ *Maclaren v. Staunton*, 7 Jur. N. S. 691; *Simpson v. Moore*, 30 Barb. 637.

⁵ *Gilbert v. Gilbert*, 29 Beav. 496.

⁶ *Gordon v. Duff*, 7 Jur. N. S. 746.

⁷ *Foot v. ex parte*, 22 Pick. 299.

general¹ and not specific, the only principle on which the distinction between a gift of a residue of land and a gift of all one's personalty can be supported, rests on the primary liability of the personalty to the testator's debts. His personalty, therefore, as such, and not conveyed in terms necessarily specific, cannot be deemed of that nature. It is only apparently of a certain quantity or amount. From that value must be deducted the unknown and uncertain amount of testator's debts.

A donee of a specific legacy is entitled to have it given to him redeemed, if subject to any pledge, or to have it specifically replaced by other property of the same description, at the value of such legacy, at the end of a year from the date of the testator's death, if the subject-matter of the specific gift was improperly sold by the executor. If the chattel be of peculiar value, such as a painting or heirloom, the executor will be restrained by injunction from disposing of it, except to pay debts.

If a legacy is given for a particular purpose which cannot be effected, as to apprentice one or the like, the legatee, nevertheless, takes a vested interest in it;² and when a future period of distribution among children is contemplated by the will, all who are born during the life of the parent, or before the period of distribution, are entitled to a share.³

The court will not give a portion intended for a younger child to the person who, by the decease of his elder brother, obtains the family estate. This is on the same principle that renders it averse to give double portions.⁴ It will rather hold a legacy to be in satis-

¹ *Calkins v. Calkins*, 1 Redf. 337; but see *Worley v. Worley*, 1 Bailey Ch. 397.

² 2 Spence, 462, 466.

³ See *Viner v. Francis*, Tud. Lead. Cas. R. Prop. 2d ed. 702.

⁴ 2 Spence, 411-413.

faction of a portion, while it will not extend a portion raisable out of land, under a settlement, to the personal estate, at all, unless it is so directed by the testator, in which case the gift takes rank only as an ordinary legacy, unless otherwise directed in the will. A portion, too, is never raisable until required. These rules show a leaning to the heir or next of kin, and a disinclination to encumber or dismember inheritances.¹

But, the infant has an immediate right to interest, even though it is not charged in the will.²

As regards future legacies, the court will compel the executor to give security for their payment, or bring the fund into court.³ A remainder-man can likewise require the tenant for life to give security that the chattels will be forthcoming, if there is danger of waste. If there is no such danger, the remainder-man is only entitled to an inventory.⁴

A first legatee of chattels consumable by use can only get the interest arising from the chattels when converted into money, unless the bequest is specific. In this case he gets the thing itself for the time limited in the will.⁵ A like rule applies where the legacy comprises some things of a permanent character.⁶

If legacies abate, owing to a deficiency of assets, and the testator had provided expressly for such deficiency, a fund subsequently arising from trusts that fail goes to the residuary legatee, and not to replace the abatement made in the legacies.⁷

¹ 2 Spence, 398.

² 2 Rop. Leg. 1257, 1348, ed. 4.

³ Story Eq. Jur. 603.

⁴ Story Eq. Jur. 604.

⁵ *Rapalye v. Rapalye*, 27 Barb. 610.

⁶ 2 Paige, 122 ; 3 Mer. 193.

⁷ *Dudman v. Sheriff*, 18 W. R. 596.

§ 3. *Payment of legacies—Interest.*

A legatee cannot compel payment before a twelve-month from the death of the testator,¹ even though he otherwise directs in the will. The legatee must, of course, be willing to perform any condition precedent.² Interest is recoverable from the time when the legacy is payable.³ But, if it is a gift of residue, or of a sum to the executor to invest for the benefit of the legatee, or is in satisfaction of a debt, or is charged on land only,⁴ or is given to a widow in lieu of dower, or for a child of the testator, and the widow or child is otherwise unprovided for in the will, the legacy so bequeathed bears interest from the death of the testator, and, in the last case put, the child will be entitled to interest, even though the possession of the fund is deferred,⁵ if his maintenance is not otherwise provided for. These rules do not apply to grandchildren.

Specific bequests will carry all gains accruing, like bonuses, by way of accession, and all interest earned thereon after the death of the testator.

If the postponement of the enjoyment of the *corpus* of a legacy given to a child is for some reason personal to the child, as, for instance, until he attains age, the gift bears interest only from a twelve-month after the testator's death.

A legacy carries interest from the date at which it vests,⁶ and, when it vests in possession, it is then at once payable, provided that a twelve-month has elapsed from the date of the testator's death. But, where property is limited to A. for life, remainder to B., B.'s re-

¹ *Hoyland v. Schenck's Estate*, 1 Harrison, 370.

² *Curtis v. Potter*, 1 Houst., 382; see Redfield on Wills, Vol. II, p. 466, and notes.

³ *Taylor v. Hibbert*, 1 Jac. & W. 308.

⁴ *Pearson v. Pearson*, 1 Sch. & Lef. 10.

⁵ *Pollard v. Pollard*, 1 Allen, 490.

⁶ *Barber v. Barber*, 3 My. & Cr. 688; *Harris v. Finch*, McLel. 141.

mainder, though vested, does not bear interest, that being expressly given to A. during his life.

A conditional or contingent legacy does not bear interest, except that where the gift is to a minor, otherwise unprovided for, the court will give the interest even before the gift vests,¹ provided the interest is not meantime otherwise disposed of. If the gift is vested, though subject to be divested, as, if the minor do not attain age, he is, of course, entitled to interest under the general rule as having a vested interest, even though he may die under age, and the gift over then take effect. Where the first interest is contingent, the interest accumulates for the benefit of the vested gift in remainder.²

If an annuity is bequeathed, interest is due one year from the testator's death; in other words, it bears interest from his death. But, interest is not due on a general legacy until two years have elapsed from the date of the testator's death,³ because the executor is allowed a year to collect and realize the assets.

On a devise to an infant, and, in case he die without issue before majority, over, the infant can only require the income meantime.⁴ A provision for maintenance, however, will not always be limited to the interest of the fund.⁵ As to deducting advances, see *Morton v. Morton*⁶ and *Bunner v. Storm*.⁷

In appointing a guardian in the State of New York, it is not necessary to pursue the words of the statute.⁸

¹ *Pinney v. Fancher*, 3 Bradf. 198.

² 2 Wms. Ex'ors, 1290.

³ *Gibson v. Bath*, 7 Ves. 89; *Bitzer v. Hahn*, 14 Serg. & R. 232.

⁴ *Bradley v. Amidon*, 10 Paige, 235.

⁵ *Van Vechten v. Van Vechten*, 8 Paige, 104; *King v. Woodhull*, 3 Edw. 79; see *Craig v. Craig*, 3 Barb. Ch. 76; *Wood v. Cone*, 7 Paige, 471; *Stewart v. Chambers*, 2 Sandf. Ch. 382.

⁶ 2 Edw. 457.

⁷ 1 Sandf. Ch. 357.

⁸ *Corrigan v. Kiernan*, 1 Bradf. 208.

A devise of rents is equivalent to a devise of the land itself.¹ In Ruppert's estate,² no disposition was made of such income as might accrue on each child's share of the real estate after that child should attain majority. It was held that such income must remain in the hands of the trustees until final distribution, and then be distributed among the residuary legatees. A testator gave property to his wife "for her benefit and support and the support of his son." It was held that half the income was for the wife's support, and half for that of the son.³ For a decision under the 1 N. Y. Rev. Stat., 726, § 40, with respect to a beneficiary being entitled to accumulations, as being "the person presumptively entitled to the next eventual estate," see *Schettler v. Smith*.⁴

A tenant for life of the interest of a fund is virtually tenant for life of the principal, and entitled to its possession upon securing the interest of those in remainder.⁵ As to interest, see, further, *Cooper v. Scott*.⁶

§ 4. *Specific devises.*

Devises of freehold and bequests of chattel land are specific, whether given as a residue or by particular description.⁷ But, in *Blaney v. Blaney*,⁸ Metcalf, J., said that the English rule, which regarded a devise of land as specific is destroyed by a statute which enables

¹ Schryer's Estate, 2 Brews. (Pa.) 526.

² 1 Tuck. (N. Y. Surr.) 480.

³ *Loring v. Loring*, 100 Mass. 340.

⁴ 41 N. Y. 328.

⁵ *Parker's App.* 61 Pa. St. 478.

⁶ 62 Pa. St. 139; *Leddel v. Starr*, 20 N. J. Eq. (5 C. E. Gr.) 274; *Devlin's Estate*, 1 Tuck. (N. Y. Surr.) 460; *Fish's Estate*, 1 Tuck. (N. Y. Surr.) 122.

⁷ *Gibbons v. Eyden*, L. R. 7 Eq. 371; see *Clark v. Clark*, 11 Jur. N. S. 820.

⁸ 1 Cush. 107, 116.

the testator to dispose of after-acquired lands. A contrary doctrine prevails in England. On principle, the present English doctrine seems the sounder. The rule established by the Revised Statutes of New York, the 1st Vict. c. 26, and the analogous Revised Statutes of Massachusetts, &c., applies only to the disposing power of testators who use general language, but does not affect the inherent specific nature of a devise of land. Those statutes, too, were not intended to work any change in the law of specific devises.

In *Walker v. Parker*,¹ a devise of "the balance of my real estate, believed to consist of lots numbered six," &c., was held to be specific, though, in *Blaney v. Blaney*,² it was held that a residuary devise of land is not specific, where, as in Massachusetts,³ there is a statute which operates to pass lands acquired after the making of the will.

Where there was a specific devise to a wife of one-third part of the testator's real estate for life, remainder to his son, followed by specific devises to the son and to other persons, it was held that the devise to the wife was to be satisfied out of the whole estate, and not exclusively out of the specific devise to the son.⁴

As to the effect of a residuary devise to passing land, a specific devise of which was revoked by a change of interest in the testator, see *Bosley v. Bosley*.⁵

§ 5. *Residue—Realty.*

A residuary devise⁶ of realty does not comprise either lapsed or void devises, except where a local stat-

¹ 13 Pet. U. S. 166.

² 1 Cush. 107.

³ Rev. Stat. c. 62, § 3.

⁴ *Walker v. Parker*, 13 Pet. 166.

⁵ 14 How. 390.

⁶ *Van Kleeck v. Reformed Dutch Church*, 20 Wend. 457.

ute is in question. But, a residuary bequest of personality includes such ineffectual gifts.¹ They will likewise be included in case of a revoked disposition.² Sometimes, however, owing to the context, a residuary legatee takes only a part of the residue.³

As specific sums given out of real estate directed to be sold fall to the heir, and not to the residuary devisee, when the trust for sale is void, authority as well as principle seem to imply that the heir, and not the residuary devisee, should take void as well as lapsed devises. The true foundation of the rule, however, is the favor shown to the heir by the law. He must take in a doubtful case, and as a residuary devise of land is specific, it seems rather strong to hold that it includes specifically what is intended to be specifically given to another.

If the specific devisee takes only a partial interest, and not the fee, the residuary devisee, of course, takes the remainder; for, unless it is expressly limited to the heir.⁴ If the specific devisee is also the residuary devisee, he will still be preferred to the heir.

In England and several of the American States at present, a will of land speaks from the death of the testator, and residuary devises include lapsed and void devises. In cases arising under such statutes, therefore, few cases of difficulty can occur. A residuary devise, accordingly, is held, under these enactments, to include all rents not expressly disposed of.⁵

As a contingent residuary bequest carries prior income,⁶ Jarman thinks⁷ that a contingent residuary

¹ *Bowers v. Smith*, 10 Paige, 193.

² *Kip v. Van Cortland*, 7 Hill, 346.

³ *King v. Woodhull*, 3 Edw. 79.

⁴ *Smith d. Davis v. Saunders*, 2 Bl. 736.

⁵ But see *Brailsford v. Heyward*, 2 Desaus, 32.

⁶ *Trevanion v. Vivian*, 2 Ves. Sen. 430.

⁷ Vol. I, 595.

devise should have the same effect. On the other hand, as a contingent or future specific devise does not carry the income meantime, and as a residuary devise is still specific, it is doubtful whether it ought to attract the previous income. The better opinion appears to be that it should not carry the income in question. The rights of the heir are to be strictly guarded. Jarman's reasoning to the contrary proves too much. It is equally applicable to specific devises. But, although a future estate in land does not carry the intermediate rents, yet, if the real and personal estate be mixed up in one fund, the whole property is then impressed with the nature and incidents of personalty, and the future estate will attract the intermediate rents.¹

In *Tucker v. Tucker*,² it was held that a void devise only falls into the residue, when the particular devisee of the void gift is also residuary devisee, and no statute provides to the contrary. However, both in England and most of the States, at present a residuary devise comprises lapsed and void devises.³ The heir, even when a particular devisee,⁴ and not the residuary devisee, takes undisposed-of realty.⁵ The residuary devisee, of course, takes all remainders after express devises for life.⁶ A lapsed gift of money arising from the sale of realty falls to the heir. But, a residuary devisee of testator's "property" takes land sought to be conveyed by a void devise in the will.⁷

¹ *Genery v. Fitzgerald*, Jac. 408.

² 1 Seld. 408.

³ 1 Vict. c. 26, § 25; *Frazier v. Frazier*, 2 Leigh, 642; *Redfield on Wills*, Vol. II, 174.

⁴ *Tongue v. Nutwell*, 13 Md. 415.

⁵ *Ridgely v. Bond*, 18 Md. 433; *Van Kleet v. The Reformed Dutch Church*, 6 Paige, 600.

⁶ *Cline v. Latimer*, 1 Winst. Law, 207.

⁷ *Morris v. Henderson*, 37 Miss. 492.

§ 6. *Residue—Personalty.*

A residuary bequest comprises lapsed and void bequests,¹ though, if the gift relates to land, the heir, as already stated, and not the residuary devisee, takes what is void as well as what lapses, notwithstanding that it has been doubted whether he takes void gifts.² This distinction between residuary legatees and devisees obtains in America as well as in England.³ A legatee of a portion of the residue, however, will not take a lapsed or void gift of another portion of the residue.⁴ Such gifts will enure for the benefit of the next of kin.⁵

A residue is generally bequeathed by the words "rest and residue;" but, any equivalent expression renders the gift residuary. The phrase "goods, chattels and effects," will amount to a general residuary gift.⁶ The word "effects" is still more comprehensive than "goods and chattels," and will comprise things in action. Sometimes, however, general words are construed merely as a sort of *et cetera* to the articles previously enumerated, and not to amount to a gift of the residue, especially if there are particular legacies given afterwards to the donee of the residue himself or to others.⁷ But a gift of "all the rest, residue and remainder of my estate and effects" will not be construed as restricted to articles afterwards enumerated,⁸ unless there is another gift of the residue. In *Anison v. Simpson*,⁹ a bequest of

¹ *Banks v. Phelan*, 4 Barb. Sup. Ct. 80; *James v. James*, 4 Paige, 115; *Peay v. Barber*, 1 Hill Ch. (S. C.) 95.

² *Van Kleet v. the Reformed Dutch Church*, 6 Paige, 600.

³ *Redfield on Wills*, Vol II, 117.

⁴ *Skrymsher v. Northcote*, 1 Swanst. 566.

⁵ *Sykes v. Sykes*, Law Rep. 3 Ch. App. 301.

⁶ See *Hearne v. Wigginton*, Mad. & Geld. 119.

⁷ *Crichton v. Symes*, 3 Atk. 61.

⁸ *Fisher v. Hepburn*, 14 Beav. 626.

⁹ *Johns. Eng. Ch.* 43.

"furniture, goods, ready money, debts and securities," was held to carry the residue. Except with a friendly context, however, the words "goods," "money," &c. will not carry the residue.

A gift of the residue is often construed to mean a particular legacy, and, as such, not to abate except rateably with the other legacies. But the courts are disinclined to this construction, if it work a partial intestacy.¹ A general residuary clause will, therefore, operate as an execution of a power.²

§ 7. *Cumulative Legacies.*

If two or more legacies of the same specific article, or of the same interest or sum of money are given in the same will, or the same codicil, to the same person, the second gift is presumed to be a repetition of the prior one and to confer no new interest, unless the context is to the contrary.³ But if the gifts are in separate testamentary instruments, or if they differ in amount, they are presumed to be cumulative,⁴ unless the presumption is rebutted on the construction of the whole will.

If the same motive is expressed for conferring both gifts, or if other coincidences are apparent between the two donations, such resemblances strengthen the presumption that the legacies are not cumulative. On the other hand, the contention for accumulation will be strengthened by any differences between the two gifts, whether the diversity of the latter be found in the amount, in the character in which it is given, in the mode of enjoyment, in the extent of interest, or in the

¹ Crooke v. De Vandes, 9 Ves. 197.

² Bangs v. Smith, 98 Mass. 270.

³ Suisse v. Lowther, 2 Hare, 424, 432.

⁴ Hooley v. Hatton, 1 Br. C. C. 390 n; see Ridges v. Morrison, 1 Br. C. C. 389.

motive for the bounty.¹ But, if no such element is found in the context, the general presumption against double legacies will prevail, if these are in the same instrument.

Sometimes a variation of circumstance is a proof of the identity of the two legacies, as where a gift is given to a married woman, and it is afterwards given her for her separate use, the construction is that the second limitation was merely instituted for caution's sake.²

If the gifts, however, whether the same or not in amount, are in different instruments, or vary in their dates of payment, or in the conditions respecting their vesting, or the like, the presumption is that they are cumulative.³

If the gifts are in different instruments, mere coincidence in amount will not rebut the presumption that the legacies are cumulative. But if the same motive is expressed for bequeathing both gifts, and their amount is the same, this double coincidence will render the legacies repetitive merely,⁴ unless the second instrument is essentially in substitution for, and not in addition to, the first.

If there is a repetition of several gifts, this shows that none at all of the new legacies was intended to be cumulative.⁵ The word "besides," however, in the second instrument, will show that the gifts were intended to be cumulative.⁶

¹ See *De Witt v. Yates*, 10 Johns. 156.

² *Greenwood v. Greenwood*, 1 Br. C. C. 30; *Wilson v. O'Leary*, 20 W. R. 28.

³ *Wray v. Field, Mad. & Geld.* 300; *Hoffman, Admr. v. Cromwell*, 6 G. & J. 144.

⁴ *Hurst v. Beach*, 5 Mad. 351.

⁵ *Coote v. Boyd*, 2 Br. C. C. 521.

⁶ *Guy v. Sharp*, 1 My. & K. 589.

As regards repetitions of specific, as distinguished from demonstrative, gifts, they cannot be cumulative.¹ If, in different wills, as distinguished from a will and codicil, they are not *prima facie* cumulative, as a subsequent will is substitutional for a prior one, whereas a codicil is an addition to it.

The rules respecting repeated legacies may be thus summarized. A specific legacy, though bequeathed in different instruments, passes only once. Two legacies of quantity, of equal amount, in the same instrument, pass only once. But, if the legacies are unequal in amount, or are limited on different contingencies,² though in the same instrument, or of equal amount but in different instruments, the gifts are cumulative.

The American courts, it is to be remembered, lean rather strongly against accumulation, although, in the absence of any clue in the context, they would doubtless interpret the disposition itself according to the English rules.³

In *Hurst v. Beach*,⁴ Sir John Leach rejected parol evidence intended to show that a legacy of £500 in a codicil, was substitutional for a legacy of £300 in a will. He said such evidence was admissible only when the presumption was against the letter of a will. This is an important doctrine with respect to the admissibility of parol evidence.⁵

¹ *Duke of St. Albans v. Beaucherk*, 2 Atk. 636.

² *Jones v. Creveling*, 4 Har. 127.

³ See *Cunningham v. Spickles*, 4 Gill, 280; 1 Zabriskie Rep. 573; 2 Lomax on Exors. 173, 176, 2d ed.

⁴ 5 Madd. 351.

⁵ See Part I, 271, *et seq.*

CHAPTER XXV.

ADMINISTRATION OF ASSETS.

§ 1. *General principles.*

Assets are legal or equitable. Legal assets are those which the executor takes by operation of law, and which creditors could attach in a court of law. Equitable assets are those which the executor takes by an express charge of the testator, and which a creditor could only reach through a court of equity. Assets are thus denominated legal or equitable according to the kind of remedy open to the creditor, and not according to their own nature. For, an equitable estate is legal assets, if any statute enables the creditor to seize and appropriate such property at law.¹ An equity of redemption, therefore, constitutes legal assets² in the United States. So does any fund undistinguishable from the testator's own personalty.

Equity follows the law as regards legal assets, and also gives priority to specific charges according to their dates. But, where the assets are not legal, or the charge specific, the court administers the assets *pari passu* among all the creditors, and then among the legatees. If the fund is insufficient to pay all the creditors, they must abate *pro rata*, and so must the legatees, if the fund, though adequate to meet the claims of the creditors, is insufficient to satisfy all the legacies, unless the testator have otherwise directed.³

¹ See *Silk v. Prime*, 2 White & Tud. Lead. Cas. and notes thereto, 2d ed. 82, 95, *et seq.*; Story, 551, 552; 2 Spence, 314, 315.

² 4 Kent, 5th ed. 161; Judge Perkins' notes to 2 Jarm. 545; *Van Ness v. Hyatt*, 13 Peters, 294.

³ Story, 554-6.

A few observations only are required on the order of administering assets for debts and legacies charged on land.

As to debts, a trust for their payment renders them payable, not in distinct classes, as special and simple, but *pari passu*. Debts barred by the statute of limitations are not revived by such a charge,¹ although, in England, it will prevent the statute from running in favor of the testator's real representative, but not in favor of his executor, as to whom the charge is inoperative, being expressive only of his common law duty.² Neither does such a charge make simple contract debts bear interest.

The *pari passu* rule is applied to charges as well as devises in trust, and to the latter even though the executors are the devisees in trust. Specialty creditors, availing themselves of such a charge, must allow the simple contract creditors to share rateably in the personalty, as it is a maxim of equity, that he who seeks equity must do equity; and another maxim is, that equality is equity. But if the creditor wishes or has any specific charge, he is not bound by rules of administration, which only apply as between the testator's beneficiaries.

The following is the order of administering assets for creditors: 1. The general personalty; 2. Any estate in land expressly devised for payment of debts; 3. Estates descended;³ 4. Specific bequests and devises charged with debts;⁴ 5. General legacies, *pro rata*;⁵ 6. Residuary devises; 7. Specific legacies and devises;

¹ See *Stackhouse v. Barnston*, 10 Ves. Sumner's ed. 453, note b.

² *Moore v. Petchell*, 22 Beav. 172.

³ *Adams v. Brackett*, 5 Met. 280.

⁴ *Hubbell v. Hubbell*, 9 Pick. 561.

⁵ *Humes v. Wood*, 8 Pick. 418.

and 8. Personalty and realty appointed under a general power. In England, it has been held¹ that classes 6 and 7 are virtually the same, as a residuary devise there is held to be specific, even in wills made since 1 Vict. c. 26, under which after-acquired lands pass, as the will only speaks from the death of the testator. A different rule prevails in America, under similar enactments,² although prior thereto, every devise of land in terms, however general, was held to be specific.³

In the order of satisfaction, creditors are preferred to legatees; specific legatees are preferred to the heir and to the devisee of land charged with debts, and to a residuary devisee. But, general pecuniary legatees are not preferred to residuary devisees of land, and, *a fortiori*, not in England, where a residuary is still a specific devisee. Specific devisees of land not charged with debts are in the same rank as specific legatees. If a particular portion of the personalty is bequeathed, subject to the payment of debts and legacies, then, as between the legatees, the residuary personalty is exonerated, if there is a residuary bequest, but not where there is no gift of the residue.⁴ A devisee even of mortgaged premises is preferred to the heir-at-law, if mortgaged and unincumbered lands are specifically devised, but, after payment of debts, both classes of estates contribute rateably to the mortgage debt.⁵

The personal estate of a testator, in America, is primarily liable for all his debts, even to those by mortgage.⁶ Lands, however, are auxiliary assets in most of

¹ *Pearman v. Twiss*, 2 Giff. 130.

² *Blaney v. Blaney*, 1 Cush. 107.

³ *Mirehouse v. Scaif*, 2 Myl. & Cr. 695; see Rev. Stat. Mass. c. 62.

⁴ Story Eq. Jur. 571.

⁵ Story Eq. Jur. 571; Smith's Manual Eq. Jur. 283, 1st Am. ed.

⁶ *Wyse v. Smith*, 4 Gill. & J. 295; *McDowell v. Laules*, 6 Mon. 141; *Chase v. Lockerman*, 11 Gill. & J. 185; *McCampbell v. McCampbell*, 5 Litt. 95.

the States, just as they are in England since the 3 & 4 W. 4, c. 104. But, it is doubtful whether the common law rule does not still prevail in Virginia and Kentucky.¹

A devisee of a mortgaged estate is not entitled to exoneration out of a specific legacy, but takes subject to any charge thereon, even where his old rights to exoneration are left untouched by any recent statute. Where debts are charged on a devise, the devisee, in point of principle, ought to be liable for the debts before the heir. Yet the contrary has always been the law,² unless there was a devise also to the heir.³

If personalty and land are expressly charged, both contribute *pro rata*, whether mixed up in a common fund or not,⁴ although the residue reverts to the heir or next of kin, according as it is primarily personal or real. Different lands or specific gifts of realty and personalty, when liable to a common charge, contribute *pro rata*.⁵ Specific legacies, however, do not abate with general legacies.

An appointment under a general power is assets, though the power itself is not, as, to be operative at all, it must be exercised. A trust power is assets for the creditors and legatees of the intended appointees, but not for those of the appointer.⁶

§ 2. *Marshalling of assets.*

Although marshalling relates to administration rather than to construction, yet, as it is a consequence

¹ 4 Kent, 5th ed. 421, 422, and notes.

² *Manning v. Spooner*, 3 Ves. 114.

³ *Brederman v. Seymour*, 3 Beav. 368.

⁴ See *Swoope's App.* 27 Penn. St. Rep. 58; *Witman v. Norton*, 6 Binn. 395.

⁵ *Livingston v. Livingston*, 3 Johns. Ch. 148.

⁶ See *Williams on Real Assets*, also chapter XVII, *supra*, § 2.

of legal interpretation¹ and as the doctrine may rest upon, and influence to some extent, the construction of a will, a brief notice of the equitable rules for marshalling assets seems necessary for the completeness of our enquiry. The principle of the doctrine of marshalling is, that where one creditor can at law reach two or more funds, and another creditor cannot reach all these assets of their common debtor, the former will be presumed to seek satisfaction only out of the funds exclusively available to him, so far as the claims of the other creditors against the common debtor are concerned. If, then, the best circumstanced creditor exhausts at law the funds alone available to the other or restricted creditor, the latter in equity is allowed to stand *pro tanto* in the shoes of the former, and is deemed to have an implied transfer of his claims.² Therefore, of the various classes of property and gifts specified, *supra*,³ if the creditor seizes the property in a lower class, the donee of a gift in the latter will be reimbursed out of the interests more immediately liable; in other words, such property or assets are marshalled in his favor.

The practical test of a right to marshal is easily understood. If a beneficiary find that any one else has on the testator's assets a claim which, if satisfied one way, will defeat the gift to himself wholly or in part, but which may be satisfied in some other way without having this effect, the legatee can compel the creditor to confine himself to the latter fund, or else the legatee may stand in his place until compensated. The court so arranges the claims and the funds as to carry out as far as possible, *ut res magis valeat*, the claims of

¹ See *Hensman v. Fryer*, L. R. 2 Eq. 627; *contra*, *Eddels v. Johnson*, 1 Giff. 22; *Pearman v. Twiss*, 2 Giff. 130.

² See *Aldrich v. Cooper*, 2 White. & Tud. Lead. Cas. 2d ed., *et seq.*

³ Pp. 354-5.

the various classes of creditors, legatees, and beneficiaries.

Marshalling¹ is adopted not only in favor of any class of creditors but of legatees, (except residuary legatees, where the residue is not exonerated by the testator), portionists, heirs at law, and devisees, and as against simple contract creditors in favor of legatees, and also against a surety for a first mortgagor in favor of a second mortgagee.²

Legatees are substituted for creditors by specialty as against real assets descended. Legatees are likewise put in place of a mortgagee who has exhausted the personality, whether the mortgaged lands have descended to the heir at law or been devised burdened with the mortgage.³ Marshalling is also allowed, of course, to legatees when the personality is exhausted by creditors, although there is a trust for payment of debts, and even where there is no trust, in all the States where land is assets for simple contract creditors.⁴

A devisee or specific legatee of a chattel mortgaged is entitled to exoneration out of the general personality, even though the mortgage have been with a power of sale, by exercising which the mortgagee could, during the testator's lifetime, have defeated the gift *in specie*. So it has been held that a legatee of shares or stocks is entitled to have future calls paid out of the general personality.⁵ This seems to be a very hard case, and an undue extension of a somewhat technical rule. But legatees whose gifts are out of a residue have, *ex vi termini*, no claim to anything but what is left after satisfying all legal demands. Neither has a legatee any equity of marshalling against a devisee, whether

¹ Story Eq. Jur. 562-566.

² See *Louth v. Bloxam*, 2 Hem. & Mil. 457.

³ *Surtees v. Perkins*, 19 Beav. 406.

⁴ Story, 566.

⁵ *Blomt v. Hopkins*, 7 Sim. 51.

specific or residuary,¹ of unincumbered land. But he has against a legatee whose gift is charged on land.² Assets are not marshalled in favor of charities in England and most of the States, as the mortmain laws, being also rules of public policy, are therefore stronger than ordinary laws, whether common or statutory. In the United States, the reluctance of the courts thus to marshal is perhaps a consequence of its general indisposition to adopt a *cy pres* construction or administration.

Marshalling is allowed as between simple contract creditors and a vendee of land, and as between legatees and the testator's heir or devisee,³ in respect of the vendor's lien for unpaid purchase-money, where the matter is not provided for by a statute. This relief, however, is rarely given against a devisee in the United States.⁴ The value of a specific gift is owing to the doctrine of marshalling, as it compels any chargeant on the subject of the specific gift to resort to the general personalty, or else entitles the specific donee to do so. Marshalling is allowed in favor of a widow's paraphernalia. As to foreign assets, the intention of the testator determines the funds for payment in cases of testacy. But, the priorities of creditors are adjusted according to the laws of the testator's domicile.⁵

In *Promise v. Abingdon*,⁶ a legatee who died before the time for paying his legacy, which was charged on land, had elapsed, and who thereby lost his hold on the realty, was held to have no claim to marshal. The case, however, is obscure, and is disapproved of by Jarman.⁷

Marshalling is not enforced against a purchaser for

¹ See *Hensman v. Fryer*, L. R. 2 Eq. Cas. 627, *contra*.

² 2 Spence, 820, 830; 2 Story, 565.

³ Story, 564a; 2 Sp. 833; *Sproule v. Prior*, 8 Sim. 189.

⁴ Judge Perkins notes to 2 Jarm. 601, and cases there cited.

⁵ *Wilson v. Dunsany*, 18 Beav. 293.

⁶ 1 Atk. 482.

⁷ Vol. II, 608.

value without notice, at least if the party claiming to marshal is *puisne* in the order of time to the security he seeks to marshal against. For, where the equities and laws are equal, priority in time prevails.¹

§ 3. *Ademption of legacies.*

Ademption is a mode of satisfaction or payment, and not a question of construction. Therefore, where a testator gives a legacy for a particular purpose and afterwards gives the legatee the same sum for the same purpose, this is an ademption,² even where the testator is no relative of the legatee.

A testator advanced money to a husband whose wife would be at his death an heir and distributee of the testator, and directed that the husband should be debited with the amount, that it might be deducted after the testator's death "from the share coming to the family." It was held that such sum was not to be deducted from a legacy given to the wife by a subsequent will.³

A legacy to a creditor is a satisfaction of the debt; so a legacy to a child is deemed to be a satisfaction of a portion. But these presumptions of equity may be rebutted or supported by parol evidence even of the testator's intention.

All legacies, it is to be remembered, abate *pro rata* in case a posthumous child is born to the testator, who made no provision either in the will or otherwise for it. A legatee to whom, alone, endearing expressions are used, nevertheless must abate whenever a *pro rata* contribution is legally made on legatees.

¹ *Averall v. Wade*, L. & C. Temp. Sugden, 252.

² *Monck v. Monck*, 1 Ball & B. 298.

³ *Gallego v. Gallego*, 2 Brock. 286.

§ 4. *Ademption of specific legacies.*

A specific legacy becomes adeemed when the testator parts with the subject-matter of the gift, or alters its form so that it can no longer be identified. Thus, a specific legacy of a gold chain is adeemed by its sale or its being melted.¹ A legacy of a debt is adeemed by its being paid to the testator, and a part payment operates as an ademption *pro tanto*. Stock specifically bequeathed is likewise adeemed to the extent to which it is sold by the testator,² even though he purchases more of the same kind.³ If the goods which are the subject of a specific bequest have been destroyed by accident during the life of the testator, or perish with him at sea, or never were his property, the legacy is adeemed.⁴ A legacy, *semble*, is not held to be adeemed in America on slight variations of its nature or investment.⁵

Ademption is not occasioned by pawning;⁶ neither does any necessary removal of furniture, books, &c., specifically bequeathed as at a certain place, work an ademption. A lease, if a legal one, has been deemed in England to be so altered by renewal as not to pass under a previous specific gift.⁷ But it is not likely that this doctrine, if at all valid at the present day, even in England, would be extended to leases renewed under a covenant for perpetual renewal, unless the surrenderor of the old lease obtained some advantage by the surrender.

¹ Ford v. Ford, 3 Foster, 212; Donahue v. Lea, 1 Swan (Tenn.) 119.

² White v. Winchester, 6 Pick. 48; Welch's App. 4 Cas. 363.

³ Pattison v. Pattison, 1 M. & K. 12.

⁴ See 2 Redfield on Wills, p. 431; Havens v. Havens, 1 Sandf. Ch. 324; Smith v. Jones, 4 Ohio, 115.

⁵ See Walton v. Walton, 7 Johns. Ch. 258; Cogdell's Ex'ors v. His Widow, 3 Desaus, 346.

⁶ See Walton v. Walton, 7 Johns Ch. 265; Hoke v. Herman, 9 Harris, 301.

⁷ Abney v. Miller, 2 Atk. 593.

It has been held here that a bequest of a lease which is specific, is not adeemed by a renewal in the lifetime of the tenant for life,¹ *semble*, even though the renewal be more beneficial than the interest bequeathed.² The fees and other cost of renewal will be apportioned between the tenant for life and remainder-man.³ A conversion by operation of law or by statute, or by an accident, does not work an ademption.⁴

Yet, a legacy given to A., and, if he die with out issue, then to B., will be adeemed as to both by a subsequent gift to A.⁵

Where a testator sold all his personalty and made the notes payable to the legatees, it was held that the sale worked an ademption of certain legacies, but that, under the circumstances, the notes belonged to the legatees.⁶ In *McNaughton v. McNaughton*,⁷ however, after a devise of land for life, remainder in trust for sale on certain trusts, the testator sold the land. This was held to adeem both the life estate and the trusts of the proceeds of sale.

A legacy revoked, adeemed or satisfied is not revived by a republication of the will, or by a codicil, though this may always pass lands acquired after the date of the will.⁸ But, if, after the ademption of the subject of a specific legacy, the testator acquires similar property, and republishes his will or makes a codicil, the specific legacy will be revived.⁹

¹ *Covenhoven v. Shuler*, 2 Paige, 122.

² *Doe v. Porter*, 3 T. R. 13.

³ See 1 Rep. on Leg. 318.

⁴ *Walton v. Walton*, 7 Johns. Ch. 258; *Warner v. Beach*, 4 Gray, 162; *Verdier v. Verdier*, 8 Rich. (S. C.) 135; but see *Hoke v. Herman*, 21 Penn. (9 Harris,) 301.

⁵ *Twining v. Powell*, 2 Coll. 262.

⁶ *Logan v. Deshay*, Clarke Ch. 209.

⁷ 34 N. Y. 201, affirming 41 Barb. 50.

⁸ 2 Williams on Ex'ors, 1199, Am. ed.

⁹ 2 Williams on Ex'ors, 1200, Am. ed.

The common law rule that alienation adeems a specific bequest is modified in Kentucky so as not to apply to bequests to testator's heirs, unless the testator so intends.¹ Where, however, bonds given as a general legacy proved worthless, it has been held in Alabama that the legatee takes nothing on account thereof.²

§ 5. *Satisfaction of debts by legacies.*

Whenever a person is bound by covenant or other obligation to give or appoint a certain interest or sum to an individual or class, any gift capable of being construed as a discharge of such obligation will be so held. Equity, besides, inclines against double gifts of every kind whether they be legacies to creditors or portions, although it is said in *Thynne v. Lord Glengall*,³ that this presumption does not apply to gifts to creditors. In these cases, as the amount of the legal liability affords a clue to some external evidence of the testator's intention to be just only and not generous, the courts have adopted the rule that where a creditor bequeaths a legacy of an equal or greater amount than the debt, and payable after the debt falls due, the legacy is only in satisfaction of the debt.⁴

If the legacy is expressed to be given for a particular motive or object, or if it is not equally as beneficial in every respect as the debt, the gift is not presumed to be a satisfaction of the legal liability even *pro tanto*. If the debt is in the nature of unliquidated damages, a floating balance, or temporary bill of exchange, the legacy will be deemed to have no reference to the debt. So, if the will contains a direction to pay debts, the court endeavors

¹ *Lilly v. Curry*, 6 Bush (Ky.) 590.

² *Gilmer v. Gilmer*, 42 Ala. 9; see *Johnson v. Farrell*, 64 N. C. 266; *Drayton's App.* 61 Pa. St. 172.

³ 2 Ho. Lds. 131.

⁴ *Eaton v. Benton*, 2 Hill N. Y. 576.

by all possible means to escape from the presumption. The question has not yet been finally settled by American decisions.¹ But, *semble*, the English principles on the point are in the main observed here.²

A bequest to a creditor is presumably a satisfaction of the debt, unless the will contains a charge of debts. If the legacy is given after the charge of debts, there is no satisfaction of the debt.³ But neither a legacy not payable at testator's death, nor a gift of an annuity for life and not a gross sum, nor a gift of a residue (as that is contingent upon there being assets),⁴ will be deemed a satisfaction. If the debt be on bond or, *semble*, even if it be only a simple contract or if it be a specific chattel or a devise of land, it will not be deemed a satisfaction. A legacy given by a parent to a child is construed, with respect to the rule in question, just as if the legacy were given to a stranger.⁵ A legacy, however, by a debtor to his creditor is presumed to be a satisfaction of the debt if the legacy is equal or greater in amount than the debt. It is said that a legacy shall always be construed a satisfaction, if there is a deficiency of assets,⁶ yet, this seems to interpret a will by the event.

A legacy may be deemed a satisfaction in America of a debt due to the legatee, even where there is no deficiency of assets, though the legacy and debt differ in their natures, or the debt is certain and the legacy is uncertain.⁷

¹ See Redfield on Wills, Vol. II, 186. ² See *Errington v. Evans*, 2 Dick. 456.

³ *Chancey's Case*, 1 P. Wms. 410.

⁴ See *Clark v. Bogard*, 2 Edw. Ch. 387; *Van Reper v. Van Reper*, 1 Green's Ch. 1; *Zeigler v. Eckert*, 6 Barb. 18.

⁵ See *Williams v. Cray*, 6 Cow. 246; *Sorelle v. Sorelle*, 5 Ala. 245; *Fitch v. Peckham*, 16 Verm. 150.

⁶ *Toller*, 337.

⁷ *Williams on Ex'ors*, 1170 Am. ed.; *Dey v. Williams*, 2 Dev. & Bat. Ch. 66.

§ 6. *Satisfaction of portions by legacies.*

The courts strongly incline against double portions; therefore legacies, even less in amount than the portions, or payable at different periods, will still be deemed satisfactions *pro tanto* of portions, though not of other debts to children.¹ A legacy, however, to a child is construed as a portion, and, therefore, a subsequent advancement of the child by the testator is an ademption of the legacy either wholly or in part.² There is a distinction between this kind of ademption and of the satisfaction of debts by legacies. For although the nature of the provisions in the will may widely vary from the portion, as if the latter be put in settlement, yet the legacy will be considered to be adeemed wholly or *pro tanto*. The courts incline so strongly against double portions.³

Yet, the presumptive ademption by advancement will not exist if the legacy and advancement are not of the same nature, or if the legacy is expressly given as a compensation for a certain interest not a portion belonging to the child, or is the gift of a residue.

If the testator is not a parent or *in loco parentis* as regards the legatee, the legacy will not be considered adeemed by a subsequent advancement, unless the legacy is given for a particular purpose and the advancement is for the same end.

In America, a legacy is deemed, as in England, to be a satisfaction of a portion.⁴ The question being one of presumption, is open to parol evidence. A distributive share in the parent's estate, however, is no discharge of

¹ 2 Story Eq. Jur. 1110, 1112.

² *Pym v. Lockyer*, 5 M. & Cr. 29.

³ 2 Williams on Ex'ors, 1201.

⁴ *Taylor v. Lanier*, 3 Murph. 98.

a duty to portion,¹ though a legacy, whether greater or less in amount than the portion, is presumed to be a satisfaction *pro tanto*.

An expression of affection will not in England prevent a legacy to a wife or child from being construed as a satisfaction of any liability or portion due to the legatee.² The English rules on this head appear to be solid. The presumption is only a slight one,³ and certainly if the testator intended to do anything more than to confirm his legal liability, he would say so in terms more or less distinct. If he does use any expression of this kind, the rule will not apply. A presumption must operate on one side or the other, and in the most abstract case conceivable the identity of a gift with a debt in point of amount indicates an identity of substance, and not any accidental coincidence.

An advancement to a child, however, in America will not be deemed a satisfaction of a legacy. But if the testator was under a legal obligation to so devise, *semble*, the English rule will so far apply.⁴

The father of an illegitimate child is a stranger in law to him. But he may be *in loco parentis* if he has treated the illegitimate child as his lawful offspring. No relationship places a person *in loco parentis* unless he has voluntarily assumed such duties.⁵ If a testator, however, though a stranger, makes a gift of the thing or sum bequeathed, this is an ademption of the legacy.⁶ As to interest on portions, see *Poole v. Poole*.⁷

With respect to the presumptive ademption of a

¹ *Twisden v. Twisden*, 9 Ves. 413; see *Campbell v. Campbell*, L. Rep. 1 Eq. 383.

² *Plunkett v. Lewis*, 3 Hare, 316.

³ *Field v. Mostin*, Dick. 543.

⁴ See *Bryant v. Hunter*, 3 Wash. C. C. 48.

⁵ *Grave v. Ld. Salisbury*, 1 Br. C. C. 425.

⁶ *Clayton v. Aikin*, 38 Ga. 320.

⁷ Eng. Law Rep. Ch. App. Jan. 1872, p. 13.

legacy to a child by subsequent advancement parol evidence is only admissible respecting the subsequent act of advancement.¹ Parol evidence, however, is also admissible to show that a testator was *in loco parentis* to the legatee.²

§ 7. *Legacies to debtors.*

A bequest of a legacy by a creditor to his debtor is not a presumptive release of the debt.³ Even an express release is only a legacy, and leaves the debt still as assets, subject to the payment of testator's debts. A legacy may also be retained for a debt barred by the statute of limitations, if the statute only extinguishes the remedy. If the legacy has been given to a married woman whose husband is indebted to the testator, the executor can retain the legacy, if the wife has died without asserting her equity to a settlement, and even if she be living. But in this last case the legacy is subject to her equity.

A legacy by a creditor to his debtor is not presumed to be a release of the debt,⁴ because, as he is under no obligation, moral or legal, to give such a bequest, there is nothing *a priori* to raise such a presumption as exists in the converse case of a bequest by a debtor to his creditor.

The appointment of a debtor as executor operates as an extinguishment of the debt at law, as he could not there sue himself, but in equity he is still liable.⁵ These rules prevail in America.

The release by will of a debt is, by the New York

¹ Hall v. Hill, 1 Dr. & W. 94, 116-9.

² Powys v. Mansfield, 3 My. & Cr. 359.

³ See 2 Williams on Ex'ors, p. 1182, *et seq.*

⁴ 2 Roper, 1063.

⁵ Freakley v. Fox, 9 B. & C. 130; Finch v. Houghton, 10 Wisc, 149; Redfield on Wills, vol. II, 192.

Revised Statutes,¹ a specific legacy to the debtor, of the debt released, and, when an attesting witness is by the will discharged from a debt due to the estate, and there is legal necessity for his becoming a witness, this state of facts operates as a discharge of the legacy.²

¹ Vol. II, 84 § 14.

² Matter of Tonnele, 5 N. Y. Leg. Obs. 254.

CHAPTER XXVI.

VOID TESTAMENTARY GIFTS.

§ 1. *Uncertain gifts.*

The courts will endeavor to make sense and law of any will, however ungrammatically expressed.¹ For this purpose it may transpose sentences in point of construction, read "and" for "or," and conversely, and often disregard the use of a very plain technical phrase.²

Latterly, very few wills are held to be wholly void for uncertainty. Yet, as the law points out who are to take on intestacy, the definite rights of these parties cannot be defeated by a mere conjecture on the part of the court as to what was a testator's intention.³ On the other hand, if the will be capable, either wholly or in part, of any clear meaning, the courts will effectuate it.⁴ Many cases, accordingly, are now-a-days held to be clear which in earlier times would have been pronounced void for uncertainty.⁵ Yet, as regards precatory powers and trusts, most text writers consider that a contrary principle of construction has been

¹ 3 Keb. 49, pl. 23; *Den v. McMurtrie*, 3 Green, 276; *Lillard v. Reynolds*, 3 Ired. 366.

² See *Townsend v. Downer*, 23 Vt. 225; *Winder v. Smith*, 2 Jones Law (N. C.) 32.

³ *Kelley v. Kelley*, 25 Pa. 460; *Wooton v. Redd*, 12 Grat. (Va.) 196.

⁴ *Mason v. Robinson*, 2 Sim. & Stu. 295; *Wooton v. Redd*, 12 Grat. (Va.) 196.

⁵ 1 Jarm. 316; *Ride v. Attricke*, 1 Keb. 692, 754, 793; *Price v. Warren*, Skinn. 266.

recently adopted by the courts, *ut res, magis pereat*. If, however, the subject or object is too indistinctly pointed out, the gift will of course fail.¹ An uncertainty in the subject-matter of a gift is perhaps more easily cured by parol than an uncertainty in the description of the object, owing to the comparatively limited extent of a testator's property. The gifts of "a home on the farm"² and "a reasonable support," to testator's widow, are not void for uncertainty.³

In the early case of *Bowman v. Milbanks*,⁴ the phrase, "I give all to my brother" was held to be void, as it seemed uncertain to what the word "all" referred. It is hardly necessary to say that such a devise would be, at the present day, held to be not only valid but also free from all doubt. Indeed, the very same point was so decided in *Mohren v. Mohren*.⁵ Even in the early case of *Taylor v. Webb*,⁶ the words, "I make my cousin Giles Bridges my sole heir and my executor," were held to pass the testator's realty and personalty. However, even at the present day, if the intended subject-matter is really indefinite, the gift is void for uncertainty. Accordingly, a bequest of some of my linen has been held to be void.⁷

But if the will refers to a definite portion of a larger quantity, there is no real indefiniteness in the gift. *Id certum est quod certum reddi potest*. Therefore a devise of two acres out of four that lie together is a good gift, and the devisee shall elect.⁸ So, if a testator devise

¹ See 1 Met. 444.

² *Willett v. Carroll*, 13 Md. 459.

³ *Thompson v. Carmichael*, 3 Sandf. Ch. 120.

⁴ 1 Lev. 130.

⁵ 1 Swans. 201.

⁶ *Styles*, 301, 307, 319.

⁷ *Peck v. Halsey*, 2 P. W. 387; see *Rothmaler v. Myers*, 4 Des. 215; *Trippe v. Frazier*, 4 Har. & J. 446; *Flint v. Hughes*, 6 Beav. 342.

⁸ *Grace Marshall's Case*, Dig. 281, a, n.

a messuage and ten acres surrounding it, part of a greater number of acres, the devisee has his choice of the ten acres.¹

Although the phrase "what shall remain or be left" at the decease of a prior donee is ambiguous, and is in many cases void,² yet if the phrase relate to furniture, the words will be construed to denote wear and tear of the previous specified articles, and therefore the limitation over will not be void for uncertainty. This construction will be the more readily adopted if the property has been limited to the previous taker expressly for life,³ or if the previous donee be given a power of appointment; for then the phrase will mean what shall have been unappointed.⁴ A gift to a charitable or public use, we may add, is never void for uncertainty of object. The only question in such cases usually is, whether the use is really charitable.

If part of the description of the property be erroneous, this is immaterial, and may be remedied by parol evidence.⁵ For instance, a devise of premises, stated to be in the occupancy of A., when the tenant was really B., is nevertheless valid if the property is otherwise sufficiently indicated.⁶ Even though part of the premises be occupied by A., yet the whole will pass.⁷ A reference to occupancy, on the other hand, often cures a defective statement of the location, as conversely.⁸ The gift will not be avoided by a mistake of the county

¹ *Hobson v. Blackburn*, 1 Myl. & Cr. 274.

² *Bland v. Bland*, 2 Cox, 309.

³ *Cooper v. Williams*, Prec. Ch. 61, 64; *Gibbs v. Tait*, 8 Sim. 132.

⁴ *Surman v. Surman*, 5 Madd. 123.

⁵ *Drew v. Drew*, 8 Foster (N. H.), 489.

⁶ *Blayne v. Gold*, Cro. Car. 447.

⁷ *Chamberlaine v. Turner*, Cro. Car. 129.

⁸ See *Dodson v. Green*, 4 Dev. 488.

where the premises in question are,¹ nor by a mistake of the person from whom part of the property was transmitted,² nor by calling it leasehold when it is freehold.³ It is very rarely, therefore, that a devise must fail on account of uncertainty in the description of the subject-matter of the gift.⁴

As to gifts of uncertain amount, see *Kirkman v. Lewis*.⁵

A bequest of "a handsome allowance"⁶ to executors would formerly be held void for uncertainty. Now it is valid. *Id certum est*, &c. But, a bequest of property absolutely to A., with remainder to B. of so much of the property as A. shall not spend, is void as to the remainder, for uncertainty.⁷ Yet, a gift of property so far as it shall not be appointed is valid.⁸

The following limitations of trust have been held void for uncertainty: "To some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria, leaving the same entirely to their disposition of it."⁹ In Virginia, however, charitable trusts must be defined with the same certainty as other trusts. The case cited, therefore, is not of universal authority.¹⁰ In Connecticut, a trust to "the most needy" of testator's brothers and

¹ *Hammond v. Ridgeley*, 5 Har. & J. 245.

² *Drew v. Drew*, 8 Foster (N. H.) 489.

³ *Doe d. Wilkins v. Kennedys*, 9 East, 366.

⁴ See *supra*, chapter 2, §§ 13, 14, *et seq.*

⁵ 17 W. R. 907; *Aston v. Wood*, L. R. 6 Eq. 419.

⁶ *Jubber v. Jubber*, 9 Sim. 503.

⁷ *Annin's Ex'ors v. Vandoren's Adm.* 1 McCarter, 135; *Condict v. King*, 2 Beasley, 375.

⁸ *Surman v. Surman*, 5 Mad. 123.

⁹ *Wheeler v. Smith*, 9 How. (U. S.) 55, 80.

¹⁰ See, however, *Harper v. Phelps*, 21 Conn. 257; *re Pennock's Estate*, 20 Penn. St. 268; *Thompson v. McKisick*, 3 Humph. 631.

sisters was executed by the court.¹ In that case it was held "that the most needy" took vested interests upon the testator's death, and that any who might have become afterwards "most needy" also were nevertheless excluded. In those States which do not require charitable trusts to be marked out by the testator with any great degree of precision, many bequests will be upheld as charitable uses which would be void in any other construction.

As to *uncertainty of object*, the following is an example: "To one of the sons of J. S." This is void, nor can parol evidence be received to show which of the sons of J. S. is referred to by the testator, because the ambiguity is patent on the face of the will.² So is a devise to twenty of one's poorest kindred,³ although this last case certainly could be fully explained by parol, and is so far unlike Strode's case that it would not be necessary to give evidence of testator's intention, but merely of facts and the circumstances of his kindred. Strode's case is plainly distinguishable from a devise to A. B., there being several A. B.'s. For this is a case of latent ambiguity, and not necessarily known to the testator. Parol evidence is always admissible to identify the A. B. intended by the testator to be the object of . . . his bounty.

A devise to three persons, "the survivor to be each other's heir," was so construed as to make the two survivors joint tenants.⁴ The old case of *Wood v. Ingersoll*,⁵ which leans the other way, is at present hardly of any authority. A devise to persons constituting a cer-

¹ *Bull v. Bull*, 8 Conn. 47.

² *Strode v. Lady Faulkland*, 3 Ch. Rep. 183; see *McDermot v. United Ins. Co.* 3 Serg. & R. 607.

³ *Webb's Case*, 1 Roll. Ab. 609 (D) 1.

⁴ *Hambleton v. Hambleton*, 1 Leon, 262.

⁵ 1 Bulst. 61

tain voluntary association is not void for uncertainty, but the members will take in their individual and not their associate character.¹

If the name or description of a legatee is erroneous, parol evidence can be given of the person really meant.² Therefore, under a bequest to John and Benedict, sons of John Sweet, a son named James, there being no John, was held entitled.³ *A fortiori*, a person may take under a name by repute.⁴ So, if the name is right, but other parts of the description are wrong, the defect can be cured by parol.⁵ The question whether an uncertainty of the description of the subject or object of a gift by will can be cured or not by parol resolves itself into the *ulterior* inquiry, is the ambiguity so patent as that the testator shows he was aware of it, and that he was leaving a part of his will undeclared in writing? As this is very rarely the case, it follows that at the present day hardly any case of uncertain or erroneous description in a will can occur which may not be remedied by parol.

§ 2. *Rule against perpetuities.*

The rule against perpetuities is founded on principles of public policy, and is not a peculiar law of tenure. This rule against perpetuities is equally applicable to personalty or realty, and to deeds as well as wills. The produce of property or trusts for accumulation are also governed by the same rules, except so far as is otherwise regulated by statute. The common law is said to

¹ Bartlett v. King, 12 Mass. 537.

² Smith v. Smith, 4 Paige, 271; Trustees v. Peaslee, 15 N. H. 317; Woods v. Moore, 4 Sandf. S. C. 537.

³ Dowsett v. Sweet, Amb. 175.

⁴ Neuthway v. Ham, Tamlyn, 316.

⁵ Standen v. Standen, 2 Ves. Jr. 589.

“abhor” a perpetuity. This aversion long ago assumed form and shape in a rule to the effect that no future interest in property could be inalienable or indestructible for a longer period than a life or lives in being and twenty-one years and nine months afterwards. This period has been adopted by analogy to the usual settlement of property on the marriage of the owner. The period of twenty-one years is independent of the fact of there being an actual minority of a remainderman; but the additional term of nine months is only allowed in case of actual gestation.¹ For the purposes of the rule, a child *en ventre sa mere* is considered as a life in being.²

Limitations after a failure of issue should be carefully made to depend on a failure of the issue that take an entail; otherwise, the remainder will be void for remoteness. If a term is antecedent to the entail, and the trusts are in any way dependent on a total failure of the issue, such trusts are void. For, as the term precedes the entail, it cannot be barred by the tenant in tail. It does not, therefore, come within the rule which prevents limitations after an estate tail from being too remote. If the remainders are common law limitations, they cannot be too remote as remainders. But no particular estate can be made to commence one hour later than twenty-one years, or after a life or lives and twenty-one years, reckoned from the testator's decease. Though the testator declines to insert lives, yet he is still limited to twenty-one years.

At common law, no question of remoteness could really arise as to land, as such property could only be settled by way of particular vested estate and contingent remainder, and the estates of the latter denomina-

¹ Cadell v. Palmer, 7 Bligh, N. S. 202.

² 1 Jarm. 223.

tion were in the power of the preceding owner of the vested interest. But settlements of personalty might be open to the objection of remoteness, if, indeed, in the early ages of the common law any settlement of personalty would be valid. Uses and devises, too, being indestructible before the statute of uses was passed, might be too remote and trusts are now in the same condition.

In *Cole v. Sewell*,¹ Lord St. Leonards denied that remainders could be too remote. But in *Wood v. Griffin*,² Bellows, J., argues, very ably for the applicability of remoteness to remainders, on the ground that otherwise an infinite series of life estates might be created to unborn children. A *cy pres* construction was not adopted in the case referred to, on the ground that the plain intention of the testator was to give the propositus only an estate for life. The *rule in Shelley's case* was abrogated in New Hampshire, by statute, in 1834.³ This, perhaps, confused the consideration of the question in the case last cited. In States, therefore, where the rule in *Shelley's case* still prevails, the state of facts referred to by Judge Bellows cannot exist, as the *cy pres* doctrine will be applied, and an estate tail be thus given to the ancestor of the unborn tenants for life. However, so long as the estates of the unborn contingent remainder-men are destructible, they cannot, in point of principle, be too remote, although they are void as possibilities upon possibilities. Such limitations, indeed, it must be admitted, have been held to be void for remoteness, also, in numberless cases.

The real Property Commissioners, Fearne, Preston,

¹ 2 Conn. & Laws, 344; cited in 2 Jarman on Wills, 728.

² 46 N. Hamp. (Hadley) 230.

³ *Crockett v. Robinson*, 46 N. Hamp. (Hadley) 454.

and Jarman, have thought that remainders could be too remote. Lewis on Perpetuity also adopts this view and supports it; like Judge Bellows, by reference to the fact that an estate for life could not, at common law, be given to the unborn son of an unborn son. Yet, it seems clear that, in point of principle, though not of authority, a common law remainder can never be too remote, for the same reason that a remainder after an entail cannot be void for remoteness. The accessory follows the principle. If the preceding tenant can defeat the remainder, it is but an accessory to his interest, and cannot be open to a distinct charge of remoteness.

No difficulty of this sort can arise as regards vested interests. The question, therefore, is only applicable to the class of remainders termed contingent. These, however, are in the power of the particular tenant, and as they can be defeated by the merger, surrender or forfeiture of his vested interest, they are equally within the limited area of legal perpetuity. If the estate of A. is vested, and as such cannot be void for remoteness, and if A. can defeat the contingent estate of B., the latter estate is equally free, as A.'s own interest is, from any imputation of being too remote. The opinion of Mr. Lewis,¹ therefore, that remainders or common law estates could be void for remoteness, although undoubtedly supported by the old authorities, seems to be wrong in principle.

The author referred to considers that as trustees to preserve contingent remainders will be prevented by Chancery from destroying the remainders, these may be too remote. But as the trustees must have the legal estate for the purpose specified, the remainders referred to are trusts, which every one admits may be void for

¹ Lewis on Perpetuity; see Sugden on Powers, Intro. p. 1.

remoteness and indestructibility. No life estate could be limited to an unborn trustee that would not be as destructible as the contingent remainder he was intended to protect. A fee to an existing trustee will, indeed, render the trusts indestructible, but then the trusts are not legal uses or remainders. Recent authority is against the position of Mr. Lewis, but the older reports are unanimously in his favor.

The application of the *cy pres* doctrine to an indefinite series of life estates is certainly *authority* for holding that these may be too remote, else why should they be reconstructed or remoulded, and why are such remainders, except the first limitation to the unborn issue, held, when in a deed, to be too remote? But, though ancient authority is on the side of such a view, it seems to be demonstratively certain that remainders, properly so called, cannot by possibility come within the reason of the rule against perpetuities.¹ Neither can a limitation after an estate tail be too remote, because the tenant in tail can bar it. If the tenant in tail dies soon after his birth, the land, still, will not be kept out of the market, but will pass to the next vested remainder-man, if the contingent remainder is not vested before that time.

Powers of sale and exchange are, for similar reasons, not open to the charge of remoteness, even when no definite period is prescribed within which the powers must be exercised. The rule against perpetuities is founded on the principle that a perpetuity keeps land out of the market. A power to *sell*, however, is an authority to bring land into the market, and, consequently, if the donee of the power be an ascertained person, and can sell at any time he pleases, the power cannot pos-

¹ See *Cole v. Sewell*, 2 Conn. & Laws. 344.

sibly be open to the objection of remoteness. A tenant in tail taking subject to such a power cannot bar it, but neither can he bar an annuity or rent to which he is subject. Are, then, rents and annuities issuing out of estates tail void for remoteness? The tenant in tail cannot sell, but the donee of the power is not thus fettered. The objection of perpetuity, therefore, applies, if at all, to the settlement of the land, not to the donee of the power. But the objection does not apply to the successive tenants of settled land, because they are virtually only tenants in tail of such lands, as the donees of the power may elect.

Jarman¹ considers that remainders may be too remote, though destructible, inasmuch as their destruction is a tortious act which cannot be presumed. This argument, however, is equally applicable to the judicial fiction of recoveries. Why should the tenants in tail barring of his issue and remaindermen be presumed? Conversely, a feoffment originally was a judicial proceeding made before the assembled freeholders, in whose presence public livery was given. It did not necessarily operate by wrong. Why then should there be any presumption against such a mode of conveyance being used, even though some of its indirect consequences would be to extinguish contingent remainders.

As a limitation that may be too remote is void from the outset, the infirmity of the construction not being curable by the result, so it may be said that a limitation to an unborn son of an unborn son is void for remoteness, inasmuch as the particular tenant may possibly never destroy this contingent remainder. But the two cases of remoteness mentioned are only seemingly analogous. They are not really apposite or correlative. In

¹ Vol. I, 226.

the former case, the limitation is *necessarily* remote in a certain event. In the latter case, the limitation is not *necessarily* remote in any event. No subsequent accident can make it too remote, while at any moment of time there is a person *in esse* who holds the contingent remainder in his hand. Remainders, therefore, never can be too remote or keep any land out of the market.

A devise to a class is void, even as to those members that are alive, if *any* of the donees may not come into existence within the allotted period of a life or lives in being and twenty-one years, or may not be *in esse* at the death of the testator, and the vesting of whose shares is postponed beyond majority.¹ If the limitation is so framed as, by possibility, to let in objects beyond the line of perpetuity, the gift is wholly void. No event ever controls construction, unless the testator expressly so desire,² and it is doubtful whether even his wish can avail against a rule of law, as distinguished from a rule of construction.

Jarman, however, admits that an interest void as executory may be good as a remainder. This is perhaps one reason of the rule that any interest that can be construed a contingent remainder will never be regarded as an executory devise. The case put by him, however, is hardly in point. It is that of a devise to A. for life, remainder in fee to the children of A. who shall attain twenty-two. If this is construed as a gift to a class, its validity is open to doubt, and, if not so construed, it does not exemplify the position which it is adduced by Jarman to support.³

A testator will rarely violate the rule against perpetuities in providing for his children or grandchildren,

¹ *Newman v. Newman*, 8 Jur. N. S. 354; 1 Jarm. 229, *et seq.*; *Leake v. Robinson*, 2 Mer. 363.

² *Lord Deerhurst v. Duke of St. Albans*, 5 Madd. 232. ³ 2 Mer. 363.

s all these latter must be born during the lives of his children. It is when conferring gifts on the issue of others that he should be on his guard not to exceed the allotted period of suspending the vesting of any interest. Of course, an unborn person may take only a life estate or a term of years. The question of perpetuity relates not to what he takes, but when he takes it.

Jarman¹ considers that not only may a limited interest be given to an unborn person, but a good remainder may be limited after it, if given to competent persons. But this position seems to be true only if the remainder be vested. As regards law, no such limitation is good as a remainder, if the particular tenant is not *in esse* at the time of the testator's decease. As an executory interest, then, the vesting is not necessarily confined to the period of a life or lives in being, and twenty-one years after. The child may not die under age. What ground, then, is there to allege that the vesting may not be suspended beyond the legal period? By reason of such possibility it is void. There is reason, doubtless, to contend that, as contingent interests of every kind are now transferable, there is no such thing as a contingent executory interest, where the person who is to take the interest is ascertained, though not the event upon which his interest is to vest. But this is not the ground Jarman takes on this point. Indeed, if a limitation is void for remoteness, all ulterior limitations not of a substitutional nature are necessarily void also.²

If a gift is limited on the happening of either of two events, one of which is too remote, and the other is not, the gift is valid and will vest in case the legal contin-

¹ Vol. II, 242. See *Cooke v. Bowler*, 2 Keen. 54.

² *Proctor v. Bishop of Bath & Wells*, 2 Black. 358.

gency is fulfilled.¹ But, if the two events cannot separately occur, the whole limitation is probably void. The law on this head is not yet clearly settled.² But, except where the contingencies are alternative or substitutional, and are thus separable, the question of remoteness is determined by what is possible, and not by what actually occurs.³

A power that may be void as to some members of a class is void *in toto*. But appointments may be made under general powers to persons who could not take under the primary deed. For a general power is equivalent to the fee for all purposes of sale; and the rule against perpetuities only applies where there is an impediment to a sale. The rule last stated, therefore, does not apply to special powers. Appointees under such must be persons who could take immediate gifts under the deed creating the special power.⁴

The rule against perpetuities, therefore, cannot be evaded by directing trustees to settle the trust property in any way not permitted to the settlor himself. Appointments, however, that exceed the limits of perpetuity are valid *pro tanto*, so far as they are confined within the limit, even though the appointments be made to all the beneficiaries as a class.⁵

An indefinite power of sale is calculated to bring property into the market rather than to keep it out of it.⁶ It is strange, therefore, that its validity should ever have been questioned on the ground of perpetuity. Jarman, however,⁷ seems to consider that such powers

¹ Fowler v. Defau, 20 Barb. 224.

² Cambridge v. Rous, 8 Ves. 12.

³ Moore v. Moore, 6 Jones Eq. 132; Loring v. Blake, 98 Mass. 258.

⁴ Bristowe v. Ward, 2 Ves. Jun. 336.

⁵ Duke of Marlborough v. Earl of Godolphin, 1 Eden. 404.

⁶ Boyce v. Hanning, Crompt. & Jer. 334; Biddle v. Perkins, 4 Sim. 135.

⁷ Vol. I, 251. This question has been discussed by the author in a review of Sugden on Powers, in Law Magazine and Review, London, May, 1862.

may in some respects be deemed weak. But the validity of those powers is now established in England by several adjudications.¹

The rule against perpetuities applies to the vesting, not the possession of estates. Sometimes it is difficult to determine whether the period in question relates to the vesting of an interest or to its being divested in favor of an ulterior donee. If the period is too remote, then, in the first case, the interest never vests. But if the period relate to the divesting of the interest, and is too remote, then the first limitation becomes absolute and indefeasible. The case is analogous to that of a condition precedent, as distinguished from a condition subsequent.

Although the course of events will not control the construction, yet the courts will seek, if possible, to effectuate the testator's intention. * The decisions have even gone so far as that, where an absolute bequest has been given to unborn persons on whom afterwards a strict settlement was made by codicil, the judges have rejected the codicil, which was void as giving estates by purchase to the children of persons unborn, and have set up the original will.²

If the void limitations are contained in the same document, yet they will often be deemed expunged or executed only *cy pres*. For instance, if a life estate be given to the unborn child of A. for life, remainder to his unborn grandson, the courts will give an entail to A.'s unborn son.³ The case of *Pitt v. Jackson*, indeed, involved a violent application of *cy pres* construction. Still it will probably be followed in future. In an ordinary case of perpetuity, the *cy pres* rule will be readily used by the courts.

¹ *Wallis v. Freestone*, 10 S. 225 ; *Davies v. Davies*, 1 Ad. & Ell. N. S. 330.

² *Arnold v. Congreve*, 1 Russ. & My. 269. ³ *Pitt v. Jackson*, 2 Br. C. C. 51.

Upon a devise to the male heirs of M. upon terms, for compliance with which one year after majority was allowed, it was held¹ that as M. might die leaving a son as yet unborn, who would be entitled to take within twelve months after he obtained majority, the contingency on which the estate depended might not happen within a life or lives in being, or within twenty-one years and nine months after the death of M. Unless, therefore, the devise should be construed so that the estate should vest on the death of M., the limitation depended upon an event which was too remote, and the remainder was void.

In *Maxwell v. Means*,² a testator devised his estate to his four brothers and sisters, and to their children, "but, if they should all die without leaving any issue of the body of either them alive at the time of the death of the survivor of them, or if such issue should die before attaining the age of twenty-one years, then" his desire was, &c. It was held that the term issue comprehended the more remote descendants, as well as the children of the devisees, and consequently that the remainder over was too remote, being limited to take effect on a contingency which might not happen during a life in being and twenty-one years afterwards.

A legacy given to A., and if he dies without leaving lawful issue then to B. is too remote as to B. For the rule under the Revised Statutes of New York,³ in cases of this sort, see *Norris v. Boyes*.⁴ The rule in *Patterson v. Ellis* applies, even though the limitation over is to the testator's children in such terms that their heirs might take. But, if the devise over is to the survivors,

¹ *Taylor v. Mason*, 9 Wheat. 325.

² 2 Brock. Marsh 1.

³ *Patterson v. Ellis*, 11 Wend. 259.

⁴ 13 N. Y. (3 Kern.) 273.

it may mean children living at the death of the party, and not a general failure of issue.¹

By the New York Revised Statutes,² all provisions relating to future estates are extended to chattels real. The absolute ownership of personal property is not to be suspended for a longer period than the duration of two lives in being at the death of the testator,³ or during the minority of a previous donee in fee. In all other respects, future limitations of personalty are assimilated in meaning to like limitations of land.⁴

In *Bean v. Hockman*,⁵ a direction to divide rents amongst testator's children, and the issue of such as might be dead was held void, as not being confined to lives in being. In the same State, in which future estates must vest within the duration of two lives, trusts or limitations beyond that period, if separable from those within the perpetuity line, will be enforced.⁶

In Michigan a perpetuity is not allowed, nor is the *cy pres* doctrine readily applied in such cases.⁷ In that State, however, it was held that a bequest of money generally, and not upon permanent uses, to an unincorporated society, is valid. In other words, indefiniteness of object is not readily construed as a perpetuity, in that State, to avoid a gift.

A limitation will often be interpreted in a secondary sense, if this will prevent an illegal suspension of interest or other invalidity.⁸ For a similar purpose of effectuating a testator's wishes, if illegal gifts, trusts or powers can be separated from legal ones, they will be

¹ *Moffat v. Strong*, 10 Johns. 12.

² Vol. I, 724, § 23; 773, §§1, 2.

³ *Thompson v. Livingston*, 4 Sandf. (N. Y.) 539.

⁴ *Hannan v. Osborn*, 4 Paige, 336; *Gott v. Cook*, 7 Paige, 521.

⁵ 31 Barb. 78; *Stephens v. Evans*, 30 Ind. 39; New York, 1 Rev. Stat. 723, § 15; Id. 773 § 1; *Schettler v. Smith*, 41 N. Y. 328; *Manice v. Manice*, 1 Lans. N. Y. 348.

⁶ *Port v. Hover*, 33 N. Y. 593.

⁷ *St. Armour v. Rivard*, 2 Mich. 294. ⁸ *Butler v. Butler*, 3 Barb. C

valid *pro tanto*.¹ But, if this separation cannot be made without defeating the general intention of the testator, all the trusts will be invalid.² If illegal contingencies can be separated from legal ones, a like rule prevails; therefore a remainder limited on a contingency which is void for remoteness may still be good on another alternative contingency not thus void.³

§ 3. *Accumulation.*

Where no statute is in question, income can be accumulated⁴ for the same period that a trust of the land itself may be deferred from vesting in interest. By the 39 & 40 G. 3, c. 98, trusts for accumulation of income must be confined in England to the period of the life of the grantor, *or* the term of twenty-one years from his death, or during the minorities of persons living at the time of death of the grantor, or during the minorities of his beneficiaries who would be allowed to take under the common rule against perpetuity. In case the trust exceeds this term, it is void *in toto*, and not merely for the illegal excess.⁵

The third section of the act excepts from its purview accumulations to pay debts or portions, or consisting of the produce of timber or wood. The testator must elect as to which of these periods he will adopt.

"Or" will not be read "and" in this statute.⁶ At least such is the opinion of Lord Eldon, in *Griffiths v. Vere*. Jarman also⁷ inclines to this opinion.

¹ *Haxtun v. Corse*, 2 Barb. Ch. 506; *Irving v. De Kay*, 9 Paige, 521; *Awdry v. Lord*, 9 N. Y. (5 Seld.) 403.

² *King v. Rundell*, 15 Barb. 139.

³ *Fowler v. Depau*, 20 Barb. 224.; *Killam v. Allen*, 52 Barb. 605; *Everitt v. Everitt*, 29 Barb. 112.

⁴ *Hawley v. James*, 5 Paige, 322.

⁵ See, however, *Langdon v. Simson*, 12 Ves. 295.

⁶ *Griffiths v. Vere*, 1 Ves. 136.

⁷ Vol. I, 267.

It is doubtful, however, whether "or" must not be read "and," in order to give effect to every clause in the act. By construing the statute literally, one of its clauses is silenced, since the term of twenty-one years necessarily comprises the minority of any infant living at the time of the testator's death. All know "the probable intention" of the legislature, but the courts can know it only from the written terms of the act.

Decisions under this act throw light on the construction of those statutes which with us have altered the common law rules against perpetuity. In *Haley v. Bannister*,¹ the testator directed an accumulation of dividends on stock until the youngest of the children of his daughter, born or to be born, should attain majority, when the whole was to be transferred to such child, and his brothers and sisters. The will contained a residuary clause. Sir J. Leach, V. C., said: "The statute prevents an accumulation of interest during the minority of an unborn child; but as to the principal, the law remains as before the statute. The excess of accumulation prohibited by the statute would form part of the residue." Jarman doubts the validity of this case, but the decision is clearly founded on the act, which however would admit of the accumulation in question if the parent of the children took any interest under the will within the meaning of the third section.

If there be a limitation of the *corpus* of the property, after a period too remote for accumulation, the ulterior limitation is still valid if within the common line of perpetuity. The statute applies only to income or produce, and not to the property that yields the revenue.

A direction to accumulate all the testator's estate for fifteen years by investment and reinvestment in bonds is, of course, valid.² If the direction for accumu-

¹ 4 Madd. 275.

² *Rhoads v. Rhoads*, 43 Ill. 239.

lation is given to those in possession, and relates merely to the mode of enjoyment, it causes no suspension and is so far inoperative.¹ If there is an absolute gift, followed by a direction to accumulate for more than twenty-one years, the income after the twenty-one years passes under the previous gift, and is not undisposed of.² Where the trust for accumulation is grafted upon an estate where vesting is deferred until after the time for accumulating, any statutory restraint upon the period for accumulating will not accelerate the vesting of the estate, and the income meantime goes to the heir, next of kin, or residuary beneficiary.³

Where a residue is directed to be accumulated, the income, when its accumulation becomes illegal, will go to the heir or next of kin, according as the property is real or personal.⁴ A provision in a will for the payment of premiums upon insurance of the lives of beneficiaries is not open to the charge of remoteness, if confined within the limits of the rule regulating the period during which property may be accumulated.⁵

Trusts for accumulation are in New York prohibited, except for infants. But where an annuity is given absolutely to a person *non compos mentis*, a court of equity may direct any surplus not required for his maintenance to be invested for his use, even though he be not an infant.⁶ If there be a direction in the will to accumulate the estate of such a beneficiary beyond the legal period, the next of kin will be entitled to the accumulations.⁷ Accumulation for the benefit of infants *in esse* at the time when such accumulations are directed to begin is

¹ Clulow's Trust, 5 Jur. N. S. 1002.

² Combe v. Hughes, 11 Jur. N. S. 194 Rolls; s. c. Id. Ch. App. 380.

³ 1 Jarm. 292; Jones v. Maggs, 9 Hare, 605.

⁴ Hull v. Hull, 24 N. Y. Ch. App. 647.

⁵ Bassil v. Lister, 9 Hare, 177.

⁶ Craig v. Craig, 3 Barb. Ch. 76; Fosdick v. Fosdick, 6 Allen, 41.

⁷ Id.

valid under the New York statute;¹ *aliter*, if the children are not *in esse*, and the right to the accumulated fund is contingent.

Where a bequest is given with a void trust for accumulation, the bequest itself may nevertheless be valid, and the trust alone be void. But if the legatee was not intended to take for his own benefit, but to be a mere trustee, there is a resulting trust to the heir or next of kin, and the trustee does not profit by reason of the invalidity of the trust. In Pennsylvania it has been held that a devise of land for the accumulation of the income beyond the term allowed is absolutely void.²

§ 4. *Restraints upon alienation.*

A restraint against alienation may be imposed on a tenant for life or years.³ The condition is good in a lease only on account of the privity between the landlord and tenant and the provision for *cesser* implied in the condition.⁴ Therefore, any property given to a person (except a trust for the separate use of a married woman) for life can no more be protected from alienation than if it were a gift in fee; but it can be made determinable on alienation or bankruptcy by a collateral limitation or a proviso for *cesser*.⁵ The cases in the United States, indeed, are contradictory on this head.⁶

In point of principle, any restriction against alienation beyond a life or lives in being is void. But such restrictions have acquired a prescriptive validity in leases of more than twenty-one years duration. Except, however, in leases alone a general restriction against

¹ Haxton v. Corse, 2 Barb. Ch. 506.

² Hildyard v. Miller, 10 Penn St. 326.

³ Rochford v. Hackman, 9 Hare, 475.

⁴ Rochford v. Hackman, 9 Hare, 480.

⁵ See 11 Jarm. & Byth. by Sweet, 486.

⁶ See notes to Dumpor's case, Smith's Lead. Cas. by Hare & Wallace, Am. ed.

alienation during a period extending beyond the line of perpetuity seems to be in principle necessarily void.

In Pennsylvania, no restriction on alienation can be imposed on an assignment or devise in fee.¹ A like rule prevails in Maryland.² But in New Hampshire and several other States such a restraint is valid if confined within the line of perpetuity.³ The restriction, however, on a grantee or devisee in fee can only be imposed by a condition.

The common law theory of the relations of conditions to the reversion is laid down in *De Peyster v. Michael*,⁴ where it is said that the right of a grantor to clog the grant with a condition in restraint of alienation depends on the question whether he retains any interest in the thing granted. This is the converse of the common law doctrine that a stranger could not take advantage of a condition. But the condition has been in some cases held not to be void, even when not attached to a reversion, if the condition is confined within the line of perpetuity.⁵ However, it seems that the value of a condition against alienation depends on the person who is to take advantage of the condition having a reversion. If he has not such an interest, the condition appears to be void as regards authority, even though the restriction is intended to operate within the line of perpetuity. Even if the condition is not against total alienation, but is merely against assignment without consent, the objection seems to apply, as land may be thus kept out of the market, especially as a condition would doubtless be held not assignable in the American courts more than in England. Unless the condition against alienation is held assignable the property cannot be conveyed without the consent of two. This

¹ *Walker v. Vincent*, 7 Harris, 369.

² *Smith v. Clark*, 10 Md, 168.

³ *Barker v. Cobb*, 36 N. H. 345.

⁴ 2 Sel. 467.

⁵ *Barker v. Cobb*, 36 N. H. 345.

is not a lawful condition, except in the case of husband and wife, for joint tenants can each assign his own share. The question is whether any land is kept out of the market. It is only the fee that can be suspended. The present interest of an adult male cannot be rendered inalienable except in a few States.

In *McWilliams v. Nisby*,¹ it was held that a provision or condition against assignment might be reserved on an alienation in fee, if the restraint was confined within the line of perpetuity. A rent may doubtless be reserved on an alienation in fee, because such a reservation does not tie up the land at all, while itself is alienable. But, as a condition on an assignment in fee cannot be itself assigned, but only released to the lessee or assignee, it seems to be equivalent to a condition in general restraint of trade in land, and, as such, to be void in principle.

The reason, probably, why such conditions were held valid originally in leases was that as the termor was the mere bailiff of the landlord, and as the latter could alien the rent, there was virtually no restraint on the alienation of any valuable interest. There seems not to be any reason for impugning a condition against assigning a life estate more than one for years. The condition, too, does not apply to bankruptcy, or alienations to creditors *in invitum* by process of law.

In *Fisher v. Taylor*,² money was devised to executors for the purchase of land, "in trust for S., the said S. to have the rents, but the same not to be liable to any debts of S." The court held that the creditors could not attach the life interest of S. This decision is not approved of,³ and is opposed to *Hammersley v. Smith*.⁴ At the same time, it seems to be quite clear that the

¹ 2 Serg. & R. 507; see *Jackson v. Schurz*, 7 Johns. 227; see *Simonds v. Simonds*, 3 Met. 562.

² 2 Rawle, 33.

³ See *Smith's Lead. Cas.* by Wharton, 68.

⁴ 4 Wharton, 128.

trust in question will be upheld in many of the United States.

§ 5. *Mortmain.*

A gift, whether a charitable one or not, to a corporation, can never be void for uncertainty of object, or as creating a perpetuity, unless a local law otherwise provides. However, the statute of 34 Hen. VIII, c. 5 (the first Wills Act) excepts corporations, from those who are qualified to take land by will. A similar law prevails in New York, and some States, while in Massachusetts, Indiana, Pennsylvania, and certain other States there is no mortmain code whatever. If the trust of a devise in mortmain is divisible, the part of it which is not for the benefit of the corporation is so far valid. But, if the trust is indivisible, the whole devise is void,¹ except in those States that place no restrictions on devises to corporations, or, as it is termed, in mortmain. The etymology of the term is most probably due to the fact that corporations formerly consisted of religious persons exclusively, and that these were deemed to be *dead* in law. License from the crown now enables corporations in England to take land by will.² Previous to that act, the royal license was of avail only when there was no intermediate manorial lord. There are few such persons now, owing to the long operation of the act *Quia emptores*, 13 Ed. I, which forbids the creation of any new manor, though old ones are gradually becoming extinguished.

The statute 43 Eliz. c. 4, amended the St. 34 Hen. VIII, c. 5, by allowing devises to corporations, if they were established for charitable uses. The 9 Geo. II, c.

¹ See *Andrew v. New York Bible & Prayer Book Soc.* 4 Sandf. Sup. Ct. 156.

² 7 & 8 Will. III, c. 37.

36, however, repealed this provision of the statute of Elizabeth as to wills of land, with the exception of certain favored institutions designated in the act. This statute, commonly called the Mortmain Act, (inasmuch as devises to charitable uses are generally made to corporations), has been adopted in Massachusetts, North Carolina, Kentucky, Indiana, Pennsylvania, and it would seem in several other States, and probably has not been abrogated in any,¹ except Virginia and Maryland. Several special statutes, however, both in England and several of the United States, enable certain corporations to take land by will.

The 43 Eliz. has not been re-enacted either in New York, New Jersey, Pennsylvania, or Maryland. But it is now certain that chancery has a common law jurisdiction to enforce charitable trusts. There is, consequently, no doubt that equity can execute such trusts, no matter whether the statute of Elizabeth has been adopted in the State or not, unless so far as statute law expressly forbids.

The statute 9 Geo. II, c. 36, avoided all devises of land to charitable uses.² As most charitable institutions are incorporated, the act of Geo. II thus came to be called the Mortmain Act, though its object is to restrict charitable, not corporate, uses of land.

The mortmain statutes have not been re-enacted, in their full spirit generally through the States. The mortmain code of those States that have legislated on the matter merely requires that the testamentary act should be performed at some certain period before death, and does not draw any distinction between real and personal property. In New York, an illegal devise to a corporation in trust is void even as to the trust.

¹ 2 Kent, 5th ed. 285; 4 Ib. 507, 508.

² Mellick v. The Asylum, Jacobs, 180.

The property descends to the heir as on an intestacy *pro tanto*.¹ But, before it was prohibited by 2 Rev. Stat. 67, § 3, a devise of land in trust to sell, and pay therefrom a legacy to a corporation not authorized by its charter to take by devise, was valid, as the Statute of Wills was an enabling statute, and the exception of corporations was deemed not to be a prohibition.² An unincorporated society may take by bequest in New York.³ In *Beekman v. People*,⁴ a will directing the establishment of a dispensary was held invalid because it involved a conversion into land for a site, and the bequest of the remaining surplus was also held to be equally void.

A gift which would be void if directly made to a corporation, cannot, it would seem, be upheld, if made in trust for it, although the high authority of Kent⁵ is to the contrary. The converse position, that an illegal devise to a corporation for a trust in itself valid is legal, was decided in *Ayres v. Meth. Ch.*⁶ For equity never wants a trustee, and if the limitation to the trustee is void on any ground, the court will appoint new trustees, where the trust itself is unexceptionable.

There is then, it seems, hardly sufficient foundation for the statement in Kent's Commentary,⁷ that though corporations were excepted from the statute of wills, yet a devise in trust for a corporation would be valid in those cases where the statute 43 of Eliz. c. 4, is

¹ *McCartee v. Orphan Asylum Society*, 9 Cow. 437; *Ayres v. Method. Epis. Church*, 3 Sandf. 351.

² *Theolog. Seminary v. Childs*, 41 Paige, 419; *Wright v. Method. Epis. Church*, Hoffm. 202.

³ 6 Paige, 639; Hoffm. 202; 3 Edw. 79.

⁴ 27 Barb. 260; compare *Burrill v. Sheill*, 2 Id. 457.

⁵ 4 Comm. 508.

⁶ 3 Sand. N. Y. 351.

⁷ Vol. IV, 508.

inapplicable.¹ It seems, also, clear that a devise in trust for a corporation would be within the equity of the exception of the statute of wills. Although equity has a common law jurisdiction to execute charitable uses, yet it must take care to follow the law, whether common or statutory, and not to contravene the plain intent of an enactment.²

In *Dashwell v. Attorney-General*,³ and *Wilderman v. Baltimore*,⁴ the objects were too indefinite, or rather uncertain. But, at all events, *semble*, a charitable devise to an unincorporated society will be executed in most of the States, if the objects, though indefinite, yet belong to an ascertainable class.⁵ In short, charitable uses are, at common law, free from all objection, on the ground of uncertainty of object or remoteness. The question in most cases, therefore, is not whether the State has adopted the 43d Eliz., but whether it has by a positive statute abrogated the common law jurisdiction of chancery to execute charitable uses.

By the New York Revised Statutes, a corporation cannot take land by will unless it is expressly authorized to do so. Yet a devise, in New York, to an individual for charitable uses, is doubtless valid, especially if the uses are not a perpetuity; in other words, if the gift is to be at once distributed. But otherwise unincorporated societies cannot be deemed authorized to take property forbidden to a corporation. For, equity will, by reason of its common law jurisdiction, execute such trusts, if this can be done without any construction *cy*

¹ See Flood's case, Hob. 136.

² See Comstock's note to 4 Kent, 506; *Owens v. The Missionary Society*, 14 N. Y. 389; *Marshall v. Downing*, 23 N. Y. 366.

³ 5 Har. & Johns. 392.

⁴ 8 Md. 551.

⁵ *Bartlett v. Nye*, 4 Met. 378; *Griffin v. Graham*, 1 Hawks, N. C. 96 see Kent, vol. IV, 508.

pres, the objects being sufficiently defined.¹ By an act passed in New York, in 1860, ch. 360, no person having a husband, wife, child, or parent, can devise or bequeath to any charitable or literary corporation more than half of his or her estate.

A devise in charity to a corporation that can take by will is valid, although it has been often laid down that a corporation cannot stand seized to a use. It was held at an early date, in England, that a devise to a corporation, though void under the statute of wills, was good if given for charitable uses. It seems, indeed, that a corporation cannot stand seized to a use different from its own, and therefore the question of devises to charitable uses is only connected with devises to corporations so far that if the association can take land by devise the gift cannot be void for uncertainty, and the corporation takes the legal estate. As charities were executed by chancery at common law, it seems equally clear that a testamentary gift to trustees for charitable purposes is valid.² In several of the States, however, where it was thought the equitable jurisdiction in respect to charities rested on 43 Eliz., and where this statute was abrogated, it has been held that charitable devises to unincorporated associations are void for uncertainty.³

Canal shares are within 9 Geo. II, c. 36, but shares in companies that trade in land are personalty,⁴ for such land is itself personalty as regards the partners. The land, indeed, must be used for the business of the company, and not held in trust for the individual share-

¹ 4 Kent, 508.

² *Orphan Asylum v. McCarter*, 9 Cow. 437.

³ *Dashwell v. Attorney-General*, 5 Har. & Johns. 392 (Md.) ; *Gallego v. Attorney-General*, 3 Leigh, 450 (Va.) ; *Wheeler v. Smith*, 9 How. U. S. 55 ; 14 N. H. 315 ; 14 N. Y. (4 Kern.) 380.

⁴ *Morris v. Glynn*, 27 Beav. 218.

holders.¹ Railway debentures not being assignments of the undertaking, are not within the statute.²

If land is vested in trustees for the individual members of a company that trades in land, in proportion to the shares of the members, and not for the purposes of the company, such a devise is an interest in land within the mortmain acts.³ A devise of land to a corporation in another State than that where it has its charter, and is prohibited from holding land, is valid.⁴ This decision seems sound in principle, since land is peculiarly amenable to the *lex loci*, and the reason of the mortmain acts does not seem to apply to a State which disregards such restrictions.

The act of 9 Geo. II, c. 36, prohibits all devises of land to charitable uses, but does not apply to bequests of pure personalty. If the gift be partly charged on land, it will only be void *pro tanto*.⁵ A condition *subsequent*, to convey to a charity, is nugatory, and the devisee holds for his own use.⁶ But, it is doubtful whether the devisee would not, at the present day, be deemed to be a trustee for the testator's heir.⁷ Requests to devisees to purchase land are, of course, equivalent to trusts for that purpose, according to the usual rules for construing precatory requests.⁸ But if the trustees have an option to lay out the money given them on land, or on personal estate, the statute will not avoid the gift.⁹

¹ Hayter v. Tucker, 4 Kay & J. 251.

² Bunting v. Marriott, 19 Beav. 163.

³ Hayter v. Tucker, 4 Kay & J. 251.

⁴ Am. Bible Soc. v. Marshall, 15 Ohio, 537.

⁵ Waite v. Webb, 6 Madd. 71.

⁶ Poor v. Miall, 6 Madd. 32.

⁷ See Stubbs v. Sargon, 2 Keen, 253.

⁸ See 2 Story Eq. Jyr. § 1068-1074; Hart v. Hart, 2 Desaus, 83; Van Dyck v. Van Beuren, 1 Caines, 84; Farwell v. Jacob, 4 Mass. 634; Bolling v. Bolling, 5 Mumf. 334.

⁹ Soresby v. Hollins, Amb. 211; Curtis v. Hutton, 14 Ves. 537.

So, where the direction will be satisfied by hiring premises, the bequest will be good.¹ Yet, a gift on condition that the charity get a certain grant of land as a gift from others is void on principle, as it tends to throw more land into mortmain.² But if it has not this effect, as, for instance, if it is to improve buildings already owned by a charity, the gift is good.³

Uses are not deemed executed in America, if the purpose of the devise requires that the devisee for uses should have the legal estate.⁴ In that case the devise was in fee to seven persons, by name and unincorporated, for the benefit of a Freemasons' Lodge. The devise was held valid, yet, it seems in point of principle to be void, on the grounds of uncertainty and remoteness, as it is not really a charitable use.

Unless the bequest is expressly of pure personalty,⁵ marshalling is not allowed in favor of charities. It is submitted that this rule has been strained too far, since a legacy not confined exclusively to personalty may be defeated if the general residue consists of only realty. If a gift consisting of realty and personalty, is made partly for charitable and partly for other uses, the charity, indeed, has no equity to improve the illegal intention of the testator. But, where he has not been guilty of any confusion of legal rights or boundaries, it is unreasonable to exclude a fair charitable bequest from the ordinary principles of marshalling. That doctrine applies to all interests primarily. If it has not been extended to certain partially void dispositions, this has been owing to the contemplated evasion of the law

¹ *Johnson v. Swan*, 3 Madd. 457.

² *Attorney-General v. Davies*, 9 Ves. 533.

³ *Harris v. Barnes*, Amb. 651.

⁴ *Van der Volgen v. Yates*, 3 Barb. Ch. 242.

⁵ *Attorney-General v. Lord Montmorris*, 1 Dick. 379.

by the testator. To exclude charities as such, and *eo nomine*, from all benefit of marshalling, has no foundation in any principle known to equity.¹ In these cases the debts and legacies were paid rateably out of the realty and personalty, and were not wholly thrown on the personalty.

A charity charged on realty as an auxiliary fund for the personalty, will be valid as far as the latter fund reaches.² The act 9 Geo. II, however, it is to be remembered, is construed strictly against charities, which are, under its provisions, even less favored than aliens, for these can get money arising from the sale of land, and can have assets marshalled for them. See *Robinson v. London Hospital*,³ as to the manner of apportioning a mixed residue between charitable and other uses.

Where lands have been long enjoyed by a charity, under a void will, it will be presumed that they had originally some other title also to the land.⁴

The court first considers the intention of the testator, as declared by the primary meaning of the terms used by him. If this intention violates the mortmain law, the court will hold the will to be so far void, and will not seek to effectuate it by giving the terms used a secondary sense.⁵

§ 6. *Various void gifts.*

The proceeds of realty impressed with a trust for conversion may be given to an alien,⁶ so may legacies raised out of land.⁷ A title to land already acquired

¹ See *Wilson v. Thomas*, 3 My. & Ke. 579; *Howse v. Chapman*, 4 Ves. 542.

² 1 Jarm. 210.

³ 10 Hare, 19.

⁴ *Attorney-General v. Moore*, 20 Beav. 119.

⁵ *Tatham v. Drummond*, 10 Jur. N. S. 1087.

⁶ *Fondrin v. Gowdey*, 3 My. & K. 383.

⁷ *Id.*

by purchase, but not by descent, is confirmed by naturalization,¹ unless the alien have conveyed it to a third party, in which case his conveyance is void by the law of England, though probably such conveyance would be deemed valid in America.

A will which contained a gift to one of the attesting witnesses was void under the statute of frauds which required that a will of land should be attested by three credible witnesses. But the statute 25 Geo. II, c. 6, avoids the gift only, unless it be to a creditor, and confirms the rest of the will. This statute is in force in several of the States.² It applies only to direct and immediate gifts, not to consequential ones, such as the curtesy of a fee given in the will to the witness's wife.³ The statute also does not apply to personalty nor to limitations to bare trustees or executors.

The laws of the different States vary on this point. The 1 Vict. c. 26, extends the disability of an attesting witness to the husband or wife of such witness and applies to wills of personalty as well as of realty. The act also allows an attesting witness to be executor, since such is, by 1 W. IV, c. 40, a trustee of any undisposed-of residue for the next of kin. The executor is in all the States a trustee for the next of kin.⁴

A devise to the testator's heir is inoperative unless the quantity or quality of the gift is different from what the inheritance would be.⁵ A different rule prevails in England. A limitation to the heir of the testator now gives him there an estate by purchase to some extent.

¹ *People v. Conklin*, 2 Hill, 67.

² *Taylor v. Taylor*, 1 Richardson, 531.

³ *Hatfield v. Thorp*, 5 B. & Ald. 589.

⁴ *Wilson v. Wilson*, 3 Binn. 567.

⁵ *Parsons v. Winslow*, 6 Mass. 178.

§ 7. *Charitable uses.*

As gifts to a corporation are never void for uncertainty or remoteness, so a like rule applies to charitable uses. Lord Hardwicke, in *Jones v. Williams*,¹ defines a charitable use as "a gift to a general public use which extends to the poor as well as the rich." A charitable use may perhaps be defined as an appropriation of property for purposes of public benefit. The education of the sons of gentlemen is a charitable use.² The doctrine of charitable uses does not rest wholly on the statute of 43 Eliz. c. 4, but is founded on the common law.³ The proper tribunal for administering charitable uses, where there is no trustee appointed by the grantor, is the common law side of the Court of Chancery.

The people of America possess all the common law prerogatives of the sovereign of England; and the common law jurisdiction of the chancellor, as the deputy of the sovereign under the sign manual, vests in the courts of each State.⁴ The American courts, therefore, can execute charitable uses, if they are not superstitious, no matter whether the statute of Elizabeth is in force in the State or not, because charitable trusts were executed by the chancellor at common law prior to the statute.⁵ Neither the common law, however, nor the statute, as regards charities, is considered to prevail in Maryland or Virginia.⁶

Restrictions against perpetuities do not apply to charitable uses.⁷ Therefore, objections on the ground of remoteness and uncertainty are often obviated by

¹ Amb. 651.² See *Price v. Maxwell*, 28 Penn. 23.³ See *Burbank v. Whitney*, 24 Pick. 146.⁴ *Griffin v. Graham*, 1 Hawks. 96.⁵ *Beall v. Fox*, 4 Ga. 404.⁶ See, however, *Beatty v. Kinty*, 2 Pet. (S. C.) 566.⁷ *Shotwell v. Mott*, 2 Sandf. Ch. 46.

construing a trust a charitable one. If such a construction can be adopted, the gift will be free from the taint of uncertainty or perpetuity.

Under the statute 43 Elizabeth, c. 4, notwithstanding the mortmain acts, a testamentary appointment is good to a corporation for charitable uses. So is a devise by a tenant in tail.¹ Devises to charitable uses are valid in America,² except that in Pennsylvania the will must have been made a month before the testator's decease.³

The statute 43 Eliz. c. 4, is in force in North Carolina and Kentucky, but the uses must be specified, as the courts in these States will not execute charitable uses *cy pres*.⁴ The statute also prevails in Massachusetts and Pennsylvania. Perhaps the reason why the American courts will not execute these uses *cy pres* is the opinion (now exploded), that chancery had no common law jurisdiction in such matters.

The statute was not re-enacted in any of the States. It is not in force in Maryland. It was repealed in Virginia and New York. As to the original jurisdiction of chancery in cases of charitable uses, independently of statutes, see *Vidal v. Mayor of Philadelphia*.⁵

The statute 43 Eliz. c. 4, contains a copious enumeration of charitable uses. But any public benefit—irrespective of sects—is a good charitable use.⁶

A charity to found a school for gentlemen's sons⁷

¹ Flood's case, Hob. 136.

² *Gass v. Wilhite*, 2 Dana, 170, 175.

³ See *Price v. Maxwell*, 28 Penn. St. 23.

⁴ *McAuley v. Wilson*, 1 Dev. (N. C.) Ch. 276.

⁵ 2 How. U. S. 128.

⁶ *Franklin v. Armfield*, 2 Sneed (Tenn.), 305; *Cresson's Appeal*, 30 Penn. St. 437; *The American Asylum v. The Phoenix Bank*, 4 Conn. 172; *Price v. Maxwell*, 28 Penn. St. 35; *Gerard Will Case*, 10. 54; *Coggelstall v. Pelton*, 7 Johns. Ch. 292.

⁷ *Atty.-G. v. Earl of Lonsdale*, 1 Sim. 109.

would in America probably be deemed a public free school, *cy pres*.¹

A gift to Shakers or even Odd Fellows is not, yet a gift to Freemasons² is, a charitable use. These societies, therefore, whether incorporated or not, can take such a gift. A like rule applies to religious and educational bodies. Gifts to such societies are charitable uses.³ In Delaware, a gift of money arising from land to the trustees of a church, for the education of its poor, is void.⁴ In Virginia, where the statute of Elizabeth is not in force, a direction that executors should distribute \$2,000 among needy and respectable widows, and pay \$1,000 towards the support of a Roman Catholic chapel in a certain place, was held to be too vague.⁵ A like decision was arrived at where the bequest was "to the Baptist Association that for ordinary purposes meets at Philadelphia annually, to be a perpetual fund for the education of youths of the Baptist denomination," &c. The association was not incorporated.⁶

In Connecticut, a devise of a farm to the yearly meeting of people called Quakers, in aid of the charitable fund of the boarding school established by the Friends of Providence, was held to be void.⁷

For the construction of charitable uses in Louisiana and Maryland, see *McDonough v. Murdock*;⁸ in Pennsylvania, see *Vidal v. Gerard*.⁹ As recent researches in England have led to the discovery that the Court of

¹ See *American Asylum v. Phoenix Bank*, 4 Conn. 172.

² *Duke v. Fuller*, 9 N. H. 536.

³ *Evangelical Assn. App.* 35 Penn. St. 316.

⁴ *State v. Wiltbank*, 2 Harrington, 18; *State v. Walter*, 2 Harrington, 151.

⁵ *Gallego v. Atty.-General*, 3 Leigh, 450.

⁶ *Baptist Association v. Hart*, 4 Wheat. 1; 3 Pet. 481.

⁷ *Greene v. Davis*, 6 Conn. 293; see *Wilderman v. Baltimore*, 8 Md. 551.

⁸ 15 How. 367.

⁹ 2 How. 127.

Chancery has a common law jurisdiction in respect to charitable uses, it is probable that the decisions which have been pronounced in some of the States here, invalidating such uses, on the ground that the statute of Elizabeth was not in force in the State in question, are no longer of any great authority.

A residuary gift to a charity may carry money directed to be laid out in buying land which the owner refused to sell.¹ The heir takes land illegally devised to corporations, but subject to any legal trust imposed thereon, where the will speaks from its date, even if there is a residuary devisee. No restriction exists in England or in the American States upon bequests of personalty to corporations.

If the testator directs a legacy for a charitable use to be paid out of pure personalty, and this is exhausted by creditors, the assets will be marshalled for the charity, but not otherwise.² The court regards even bequests to aliens with greater favor, as these may hold the proceeds of land devised to be sold for their benefit. The principle of the laws against aliens holding land is to prevent foreigners from getting thereby the franchise. But, the principle of the mortmain laws, and of the acts against superstitious uses, is to prevent a disinheritance of the heir; but this would be effected by a devise ordering a sale.³

The principle of the mortmain acts is most sound, and should be extended to bequests as well as devises. This will, doubtless, be soon done in England, as legislators now are not wholly drawn there from the landed aristocracy, as was the case when the act of George II was passed. It seems most improper to encourage a

¹ 12 Eng. Jur. Rep. 1848, p. 197.

² Attorney-Gen. v. Lord Mountmorris, 1 Dick. 379.

³ See 2 Redfield on Wills, 513.

weak-minded testator to give at his death what he would not himself part with during his life. He should not thus be allowed to cheat the reasonable expectations of his relatives. "Charity begins at home." But testators might, indeed, be allowed to devote to charitable uses, or rather to a love of notoriety, one-half of their real and personal means at death, or the whole during their lives, if they please. In New York, however, real estate cannot be devoted to charitable uses.

The act 43 Elizabeth¹ contains an exception as to Scotland, and does not operate in Ireland. The cases under it, however, are important in many respects even there, since the Court of Chancery has a common law jurisdiction in respect to charities in all countries subject to the common law.

Bequests or gifts of personalty to charitable uses are very favorably construed, and will be executed as nearly as possible in conformity with the main intentions of the testator, even if his special object be unattainable.² Therefore, a gift to such charitable uses as A. shall appoint will be executed by the court, in default of appointment by A. So, if the testator refers to indefinite objects, or to ones which fail.³ A charitable trust, therefore, as such, is never void for uncertainty, and if there are two or more charities answering the description, the fund will be divided amongst them.⁴ In some of the States, however, charitable uses will not be executed *cy pres*. Consequently, if the first object

¹ Chap. 4.

² 1 Jarm. 216; see Boyle on the Law of Charities, b. 2, c. 3, p. 147, *et seq.*; Gilman v. Hamilton, 16 Illinois, 225; The Domestic and Foreign Missionary Society's Appeal, 30 Penn. St. 425, 434.

³ Moggridge v. Shackwell, 1 Ves. Jun. 464; Mills v. Farmer, 1 Mer. 55.

⁴ Waller v. Childs, Amb. 524.

fails, there is a resulting trust to the testator's representatives. Under the New York statute¹ limiting bequests to charitable societies to one-half of the testator's estate, a bequest in excess of the authorized amount is still valid *pro tanto*, and there is an intestacy as to the remainder.²

Even in England, a bequest to pay off a mortgage debt on a meeting-house has been held invalid.³ This case, however, is obviously, in principle, inconsistent with that of *Harris v. Barnes*.⁴

A legacy is void if founded or conditioned upon an illegal grant or act, or if derived from the residue of an illegal appropriation.⁵ The accessory follows the principal. Therefore, a gift to the occupiers of certain alms-houses intended to be established by the testator contrary to law, is as void as the gift of the houses.⁶ On the other hand, the primary gift may be good, and the secondary one alone be invalid.⁷

Although charitable uses are never void for uncertainty or perpetuity in England, and never for perpetuity, and but very rarely for uncertainty, in America,⁸ they may, of course, be void for uncertainty if they are not *exclusively* charitable trusts, but are mixed up with other uses in such a way as to be undistinguishable therefrom, and the trustees die without exercising their discretion. The want of trustees to execute charities is no ground for weakening the uses, except in those States which hold that the equitable

¹ N. Y. Laws, 1860, ch. 360.

² *Leary's Estate*, 1 Tuck. (N. Y. Surr.) 233.

³ *Corbyn v. French*, 4 Ves. 418.

⁴ Amb. 651.

⁵ *Att'y-Gen. v. Davies*, 9 Ves. 535.

⁶ *Att'y-Gen. v. Goulding*, 2 Bro. C. C. 428.

⁷ *Blandford v. Thackerell*, 4 Bro. C. C. 394.

⁸ *Williams v. Williams*, 4 Seld. 525 ; 2 Story Eq. Jur. § 1158.

jurisdiction is entirely founded on the statute of Elizabeth.¹

Although no provision regarding *contracts*, in the United States constitution or elsewhere, seems applicable to gratuitous gifts to corporations, yet, in the case of *Dartmouth College v. Woodward*,² the contrary was held to be the law as regards the special provisions in the United States constitution respecting contracts.

A use, though void originally, becomes valid by lapse of time and user. A presumption arises from long user that the invalidity was authorized by special statute, even though there be no record of such enactment. This presumption, however, can only exist where the invalidity springs from the common law, and not from an express, old, but not obsolete, statute.³ Length of time, however, is no bar to a charitable use, unless the funds are meantime applied to another charitable purpose, and not to the benefit of private individuals.

A gift for such objects of benevolence and charity as the legatee may select is too indefinite to be executed by the court.⁴ Such descriptions of gift are considered to be not merely charitable uses, since they could be applied by the donee to other purposes.⁵ Even "private" charity is not a public charitable use.⁶ However, at the present day, it is probable that all such dispositions would be regarded as within

¹ See *Owens v. Missionary Soc. of M. E. Church*, 4 Kern. 380; *Bartlett v. Nye*, 4 Met. 378.

² 4 Wheaton, 518.

³ See *Shelford's Real Prop. Acts*, tit. Prescription.

⁴ *Morice v. Bishop of Durham*, 9 Ves. 408; 10 Ves. 532.

⁵ *Doe d. Toone v. Copestake*, 6 East, 328; *Vezey v. Jamson*, 1 Sim. & Stu. 69.

⁶ *Ommaney v. Butcher*, Turn. & R. 260.

the meaning of the statute of Elizabeth, or else would be executed at common law. Yet, a bequest for the erection of monuments to the memory of a large class of persons was held, in *Gilmer v. Gilmer*,¹ to be void on account of the alleged impossibility of carrying out such a direction.

A legacy, however, to the poor of a parish is a good charitable use for those of the parish not receiving alms. *Seem* the criteria of a charitable use are that it is benevolent, public, and not of a private nature.² Therefore, if trustees have an option to apply or not the whole of the fund to charitable purposes, it is not the case of a charitable use.³

If the object of a charitable use becomes extinct in the testator's lifetime, the interest will go to the next of kin.⁴ The statute of Elizabeth was construed liberally in respect to charities by the ecclesiastical tribunals.⁵ The mortmain act left the courts, however, no loophole for liberality or evasion.

The question whether a bequest is for a charitable use or not is important in some States in respect to procedure. Besides, though the gift violate no rule of law, yet, if the intended beneficiaries are indefinite, the bequest will be void, except as a charitable use. Where a gift is for a public purpose that is not equivalent to "a charitable use," and is void as indefinite, it then lapses for the benefit of the testator's representatives.⁶

If the sum to be applied to charitable uses cannot

¹ 42 Ala. 9.

² *Attorney-General v. Clarke*, Amb. 422.

³ *Kendall v. Granger*, 5 Beav. 300.

⁴ *Langford v. Gowlard*, 9 Jur. N. S. 12.

⁵ See *Redfield on Wills*, Vol. II, 506.

⁶ 2 Story Eq. Jur. § 1156; *Trustees Baptist Association v. Hart*, 4 Wheat. 1, 33, 39, 43-45; *Owens v. The Missionary Society of the M. E. Church*, 4 Kern. (N. Y.) 380; *Price v. Maxwell*, 28 Penn. St 23.

be ascertained, owing to the failure of other trusts which were first to be discharged out of the common fund, equity will not execute the charitable use.¹ But preceding definite trusts will not be suffered to absorb the whole fund.²

A gift of a surplus after a void bequest to a charitable use was held void in *Beekman v. People*.³ This case, indeed, is hardly so far consistent with the equitable rule which executes valid trusts, if separable from invalid ones. Here the sum necessary for the void purpose could be easily computed, and the remainder could be then given to the objects of the testator's bounty. The American courts, certainly, seem, on the whole, not to construe charitable uses as favorably as the English courts.⁴

If the testator leaves a blank for the charitable uses the English court will execute the gift *cy pres*, but not if the sum is not mentioned.⁵ If the testator had evidently one sole and peculiar charitable object in view, the court will not apply its *cy pres* doctrine, but will hold that a lapse or failure of the particular object has taken place.⁶ A *cy pres* construction, however, is rarely adopted in America in respect to charities.⁷

A *cy pres* execution of charitable trusts will not be granted in New York;⁸ nor in North Carolina;⁹ nor in Alabama.¹⁰

¹ 1 Jarm. 196.

² *Adm'm v. Cole*, 6 Beav. 353.

³ 27 Barb. 260.

⁴ *Phelps, Exor. v. Phelps*, 28 Barb. 121.

⁵ *Hartshorne v. Nicholson*, 26 Beav. 58.

⁶ *Russell v. Kellett*, 3 Sm. & Gif. 264.

⁷ See *Baptist Association v. Hart*, 4 Wheat. 1; s. c. 3 Peters. 484; *Goings v. Emery*, 16 Pick. 107; *Winslow v. Cummings*, 3 Cush. 358; 2 Story Eq. Jur. § 1162; 4th Kent. 5 ed. 508, note.

⁸ *Andrew v. New York Bible and Prayer Book Society*, 4 Sandf. Sup Ct. 156.

⁹ *McAuley v. Wilson*, 1 Bat. & Dev. Eq. 276; *Holland v. Peck*, 2 Ired. Eq. 255.

¹⁰ *Carter v. Balfour*, 19 Alabama, 814.

At all events, a *cy pres* application of charitable gifts does not prevail to the same extent in America as in England. But there is a resulting trust to the heir or next of kin of the testator on failure of his primary scheme.¹ However, it seems an exaggeration to hold that a *cy pres* application is never resorted to here.² In some of the States, indeed, which profess to execute charitable uses, such gifts of a very ordinary kind have been held void for uncertainty, as if any gift to a charitable use could be definite as to its objects.³ But, the American courts will apply *cy pres* rules in effectuating the especial design of the testator, though not in diverting his charity to other objects than those specified in the will.⁴

§ 8. *Religious uses.*

Bequests for superstitious uses generally are void at common law and in America,⁵ and if there is no general purpose of a legal nature indicated, the bequest will not be executed *cy pres*, even in England. In America, *cy pres* execution is not attempted in any case as regards a diversion of the fund in question to other uses than those specified in the will.⁶ By force of 23 Hen. VII, c. 10, and 1 Edw. VI, c. 14, lands devised for certain superstitious uses were forfeited to the crown. The uses referred to in these statutes were the praying for deceased persons, the maintenance of perpetual obits, lamps, &c.⁷ Judge Redfield⁸ considers that other superstitious uses than those specified in the statutes

¹ *McAuley v. Wilson*, 1 Dev. Eq. 276.

² *Gass v. Wilhite*, 2 Dana, 170.

³ *White v. Fisk*, 22 Conn. 31.

⁴ *Gilman v. Hamilton*, 16 Ill. 225.

⁵ 2 Redfield on Wills, 495.

⁶ See *Gass v. Wilhite*, 2 Dana, 170.

⁷ *Porter's case*, 1 Co. 22.

⁸ Vol. II, 495.

were not thereby invalidated,¹ but that they are void on grounds of public policy, both in England and America. They were not void at common law, however, if in accordance with the doctrines of the Roman Catholic Church, and, therefore, such uses now can only be deemed invalid as coming within the English statutes against superstitious uses. These do not apply to charitable uses. Superstitious devises lapse to the crown in England. If the gift be really superstitious, but not within the letter of those statutes, the devise or bequest is still void, but the heir or representatives (and not the crown), take the gift.² A gift to a dissenting chapel is not superstitious.³ A bequest to enable Jews to observe their rites is valid,⁴ but to propagate their doctrines is illegal.⁵ These cases, however, are mutually contradictory.

A devise, in America, for the maintenance of a Catholic priest, if construed to be in ease of the congregation, will be valid.⁶ A devise for the promotion of Christianity is valid in Massachusetts.⁷ A bequest for a like purpose in trust for the American Board of Commissioners for foreign Missions is also valid.⁸ Numerous bequests to Bible societies have been held to be valid throughout the Union, and in Vermont a religious bequest will be upheld, even though the donees are not incorporated and the gifts are indefinite.⁹ In Pennsyl-

¹ See *Cary v. Abbot*, 7 Ves. 490, 495.

² See *Shelford Ch. Uses*, 89.

³ *Att'y-Gen. v. Pearson*, 3 Mer. 353; *West v. Shuttleworth*, 2 My. & K. 684.

⁴ *Straus v. Goldsmid*, 8 Sim. 614.

⁵ *De Costa v. De Pas*, Amb. 228.

⁶ *McGinn v. Aaron*, 1 Penn. 49; see *Brewers v. Forman*, Addis, 362; *Trustees of Bishops' Fund v. Eagle Bank*, 7 Conn. 476.

⁷ *Going v. Emery*, 16 Pick. 107; see *Winslow v. Cummings*, 3 Cush. 358; *Brown v. Kelsey*, 2 Cush. 243; *Wells v. Doane*, 3 Gray, 201.

⁸ *Bartlett v. King*, 12 Mass. 537.

⁹ *Burr v. Smith*, 7 Vt. 241; *Button v. Am. Tract Soc.* 23 Vt. 336.

vania, a devise to a school in which only sectarian doctrines are inculcated is valid,¹ and a devise in the same State, for religious purposes, to an association not incorporated at the time of testator's death, but since incorporated, is valid.²

In *Cary v. Abbot*,³ it was held that a bequest for educating and bringing up poor children in the Roman Catholic faith was void. Judge Redfield⁴ considers that such a bequest would be valid in America, if there was no local statute to the contrary.⁵ The Judge, too, thinks that such a trust as that in *Cary v. Abbot* would be now executed *cy pres* in England, in favor of some other charitable object. But it is doubtful whether chancery ever executes an illegal trust *cy pres*, though it will so carry out a special or an indefinite trust of a charitable nature. The authorities that appear to incline to the contrary doctrine had special circumstances which seemed to involve a *cy pres* execution of the trusts, or else were not superstitious within the meaning of the statutes.⁶

A devise to the trustees of Brookhaven, a corporate body capable of holding land, in trust to pay the rents and profits to the minister or other ruling officer of a Baptist church which had no incorporation, was held void at law in *Jackson v. Hammond*.⁷ But a bequest to an unincorporated female society in another State, for charitable uses, is valid.⁸ In South Carolina, a testator gave to an unincorporated "Methodist Church at A., and the preachers of said church, and the Pedee Mis-

¹ *Price v. Maxwell*, 28 Penn. St. 23.

² *Zimmerman v. Andrews*, 6 Watts & S. 218.

³ 7 Ves. 490, 495; but see 2 & 3 W. 4, c. 115, § 1.

⁴ Vol. II, 495.

⁵ *Philadelphia v. Elliott*, 3 Rawle, 170; *Babb v. Reed*, 5 Rawle, 151.

⁶ 2 Story Eq. Jur. § 1168; *Moggridge v. Thackwell*, 7 Ves. 36; *Mills v. Farmer*, 1 Mer. 55, 100.

⁷ 2 Caines's Cas. Err. 357.

⁸ *Washburn v. Sewall*, 9 Met. 280; *Bartlett v. Nye*, 4 Ib. 378.

sion, \$8,000, to be put at interest forever, and the interest to be distributed by said trustees according to the several necessities of said church, preachers and mission." The bequest was held valid.¹ In Kentucky, owing to its constitution, no religious or other use is void as superstitious.²

Catholics are now, in England, on the same legal footing as dissenters, by 2 and 3 W. IV, c. 115, § 1. A bequest for the propagation of Catholic doctrine is, therefore, now valid in that country.³ But Jarman thinks⁴ a gift for masses for the repose of a soul would be void.⁵ The distinction cited is as refined as that drawn between the two Jewish cases cited by Jarman.⁶ But it is law.

Bequests to Baptists, Jews, Unitarians, Irvingites and other dissenters are valid, even in England. The 2 and 3 Will. IV, c., 115, legalizes bequests for masses for deceased persons in Ireland,⁷ but not in England.⁸

Bequests for uses against the spirit of the constitution are invalid.⁹ As to superstitious uses in America, see, further, *Gass v. Wilhite*.¹⁰

In the case of *Vander Volgen v. Yates*,¹¹ it was held that a conveyance of land to trustees in trust for the members of a Freemasons' lodge, vested the legal title in the trustees, in trust for the members of the lodge, and that on failure of heirs of the trustees, the court would still execute the trust. It was also held

¹ *Gibson v. McCall*, 1 Rich. 174; see *Witman v. Lex*, 17 Serg. & R. 88.

² *Gass v. Wilhite*, 2 Dana, 170.

³ *Bradshaw v. Tasker*, 2 My. & Keen. 221.

⁴ Vol. I, 191.

⁵ See *West v. Shuttleworth*, 2 My. & Kee. 684.

⁶ *De Costa v. De Pas*, Amb. 228; and *Straus v. Goldsmid*, 8 Sim. 614.

⁷ *Read v. Hodgins*, 7 Ir. Eq. 17.

⁸ *West v. Shuttleworth*, 2 M. & K. 684; *Blundell, in re*, 30 Beav. 360.

⁹ *Themmines v. De Bouneval*, 5 Russ. 288.

¹⁰ 2 Dana, 170.

¹¹ 3 Barb. 242.

that the statute of uses executed only those uses that entailed no special confidence in the trustees.

Judge Redfield observes very justly that, owing to the American constitution, the doctrine of superstitious uses should be very strictly construed. Indeed, there is every reason for holding that, by the constitution, all the English statutes relating to religion are abrogated here, and each case is made to rest on its own moral merits, or, rather, on its not being absolutely inconsistent with social order. Its opposition to the creed of the majority is unimportant, since there is no established church in any of the States.

§ 9. *Immoral gifts.*

Few bequests are found void for immorality. Scarcely any one is found so depraved as, in his will, to blaspheme the name or violate the law of God. Some, indeed, have "cursed God and died" immediately afterwards. But even the few whose names thus figure on the roll of folly were in the paroxysm of the last agony, when their minds doubtless were unsettled at the near prospect of eternity. Few, if any, of the descendants of Adam are so foolhardy as to draw up deliberately a will in which, for purposes of immorality, they dispose of property to objects not authorized by law.

Where a testator gave a fund to his daughter M., for life, and after her decease to all her children begotten or to be begotten, only the illegitimate children born before the testator's death took any interest.¹ Illegitimate children will not take as "children," even where there is a statute enabling them to inherit.² The decision referred to appears to be sound, inasmuch as a

¹ Law Rep. 7 Eq. 170.

² *Thompson v. Macdonald*, 2 Dev. & Bat. Eq. 463; see *Shearman v. Angel*, Bail. Eq. 351.

law of inheritance does not apply to wills. After-born children of a deceased wife's sister cannot take in England under the will of their mother, no matter how accurately they may be described in it.¹ The law of Louisiana will not uphold any provision for illegitimate children, except it be confined to maintenance.²

A bequest in violation of neutral or belligerent rights, or of any other rule of international law, is void.³

§ 10. *Relations of certain primary, to ulterior, gifts.*

Where an executory gift is in defeasance of a prior gift, and the latter fails from the outset, or by lapse, the ulterior interest, nevertheless, will take effect.⁴ So, a limitation over, in the event of the first donee having only one child, operates though he has no child.⁵ Likewise, if the prior donee disclaims or neglects to perform some prescribed act, the ulterior gift, nevertheless, takes effect.⁶

But, if the event which defeats the first estate and confers the second is capable of happening in the testator's lifetime, and if the events which happen would give an absolute interest to the first devisee if he survived the testator, the lapse of his interest affects the ulterior gift also.⁷ In other words, lapse never aids an ulterior gift contingent upon other events than lapse. The rule in *Calthorpe v. Gough* applies where the first gift is to a class. But if the members are not to be ascertained until the decease of the testator, there can be no lapse, but only the non-fulfilment of a contingency.⁸

¹ *Howarth v. Mills*, 12 Jur. N. S. 794; s. c. Law Rep. 2 Eq. 389.

² *Bennett v. Cave*, 18 La. Ann. 590.

³ *Haberston v. Vardon*, 7 Eng. L. & Eq. 228.

⁴ *Andrews v. Fullham*, 2 Stra. 1892.

⁵ *Murray v. Jones*, 3 Ves. & B. 313.

⁶ *Avelyn v. Ward*, 1 Ves. Sen. 420.

⁷ *Calthorpe v. Gough*, Cit. 3 B. C. C. 395.

⁸ See 2 Jarm. 709.

As to the rule itself, it seems very rational. It would be a very technical construction which would give to a donee a benefit in the very event in which the testator intended he should not take. As regards the ulterior devise, the lapsed gift is an absolute one, so far as that it cannot be expunged from the will, but, though ineffectual itself, in the event, yet it properly operates by construction to defeat the ulterior gift. In all cases, the valid parts of a will, if separable from the void parts, will be upheld.¹

As to the converse case of a lapse of the ulterior gift, it operates for the benefit of the heir or residuary devisee, according to the local law of the State.² But, if the executory devise fails not by lapse, but by the non-occurrence of the contingency on which it was limited, the first devisee receives the benefit of this failure of the executory devise. The failure is one of fact, so to speak, not of law, or lapse, as in the case first put. This distinction is supported by authority.³

§ 11. *Lapse.*

Lapse is the failure of a testamentary gift by reason of the donee predeceasing the testator. A lapse is not precluded by giving the donee an absolute interest in personalty or a fee in realty. The representative of the donee, in case of a lapse, takes no interest. Even a bequest to A. and his executors or administrators will in England give the latter nothing, even though A. be dead,⁴ and the limitation to the executor seems to imply

¹ Post *v. Hover*, 30 Barb. 312; 17 N. Y. 561; 22 Wend. 483; 24 *Id.* 641; 7 Paige; 521; Bean *v. Hockman*, 31 Barb. 78; Hull *v. Hull*, 24 N. Y. 647.

² See *supra*, p. 346.

³ Jackson *v. Noble*, 2 Keen, 590; see 2 Jarm. 711; Tarbuck *v. Tarbuck*, cited 2 Jarm. 375.

⁴ Maybank *v. Brooks*, 1 Bro. C. C. 84.

that the testator was providing for the contingency of a lapse, since otherwise the use of the additional words would be unnecessary. However, even though the testator expressly negative the legal event of a lapse, it will nevertheless occur, unless there is a limitation expressly over to a third party or to the executors of the donee. These last two rules would doubtless be ignored in most, if not all, of the United States. The doctrines in question are wholly irrational. It is strange that while the courts studiously endeavor, as a rule, to prevent a testamentary gift from failing, they, on this particular question of lapse, act contrary to their general beneficent tendencies.

In *Wisner v. Barnet*,¹ a testator bequeathed a certain fund to his executrix, to be paid to three persons whom he should thereafter name. He died without naming any. It was held that there was an intestacy as to the fund, which went accordingly to the persons entitled under the statute of distribution.

Where donees take as joint tenants, no lapse can occur, unless the whole class becomes extinct during the life of the testator;² *aliter*, if they take as tenants in common.³ The legal presumption is that donees take as joint tenants. But, this presumption is easily negatived in a will. The clause "equally to be divided," for instance, in such an instrument operates to create a tenancy in common, though at common law it has not this effect. The feudal doctrines were adapted to prevent the inefficacy or contingency of a gift. Hence arose the *rule in Shelley's case*, and the presumption in favor of joint tenancy—doctrines which chancery follows only when the context contains nothing to guide its choice.

¹ 4 W. C. C. 631.

² *Buffar v. Bradford*, 2 Atk. 220.

³ *Page v. Page*, 2 P. W. 489.

If the gift is to a *class*, even as tenants in common, yet, if the members of the class are not to be reckoned until a future date, those dying before that period take no interest, and occasion no lapse.¹ But if they are severally named,² the case will be different.³ If the future event happens in the testator's lifetime, any of the tenants in common, members of the class, dying after the contingent event, and before the testator's death, suffer a lapse of their shares,⁴ though Jarman⁵ questions the soundness of this rule.

Lapse may befall the equitable or the legal interest only.⁶ The question, therefore, was never open to the vexed dispute concerning the *scintilla juris*; all testamentary gifts, being so far equitable in their nature as, in the primary instance, not to depend upon any doctrine of tenure. In conveyancing *inter vivos*, however, although there never was any ground for questioning the validity of any use which would have been good as a remainder in a direct conveyance, without the intervention of trustees, yet it certainly required a statutory exposition or enactment to hold that the common law line of trustees might become extinct without affecting the rise of the future uses for which the trustees were appointed.

Charges on the interest given a beneficiary do not become extinguished on the lapse of his interest.⁷ The case is analogous to the lapse of the legal estate only, which does not affect the equitable limitation.

¹ Jarm. Vol. I, 295; Doe *d.* Stewart *v.* Sheffield, 13 East, 526; Anderson *v.* Parsons, 4 Greenl. 486.

² Knight *v.* Gould, 2 My. & K. 295.

³ Barber *v.* Barber, 3 My. & Cr. 688.

⁴ Allen *v.* Callow, 2 Ves. 289.

⁵ Vol. II, 297.

⁶ Doe *d.* Shelley *v.* Edlin, 4 Ad. & Ell. 582.

⁷ Croft *v.* Slee, 4 Ves. 60.

But charges on a devise when lapsed usually inure to the benefit of the devisee. The difficulty in some cases is to determine whether the heir should not be entitled to the charge as the produce of undisposed-of realty; in other words, whether the charge is an exception from the gift, in which case its lapse would inure for the benefit of the heir. This usually happens in the case of void charges.¹ A legacy charged on real estate fails for the benefit of the heir or devisee, if the legatee die before the time of payment, and the postponement of payment was not through a desire on the part of the testator, as indicated in the will, of accommodating the heir or devisee.²

The opinion of that most philosophic judge, Lord Eldon,³ inclines in favor of the heir, except where there is an intention totally to disinherit him. This doctrine seems sound. For, equity, though it does not regard rules of tenure favorably, yet, it favors the heir, and gives him, and not a residuary legatee, the produce of a void charge,⁴ except where statute law provides to the contrary.⁵ As the residuary devisee, however, seems to have a stronger claim than a particular devisee to the benefit of a lapsed charge, the doctrine in *Cruise v. Barley*,⁶ appears to apply *a fortiori* to lapsed charges on particular gifts, and to divert them from the particular devisee to the heir.

The provisions of 1 Vict. c. 26, § 25, and of similar statutes in the United States, making lapsed and void devises fall into the residue, apply only to cases of lapse, not to contingent charges, that never become vested.

¹ *Arnold v. Chapman*, 1 Ves. Sen. 108.

² See *Lyman v. Vanderspiegel*, 1 Aikens, Vt. 275, 280.

³ 19 Ves. 363.

⁴ *Cruise v. Barley*, 3 P. W. 20.

⁵ 1 Vict. c. 26, § 25.

⁶ *Ut sup.*

The acts referred to provide against a lapse of an estate tail, or of an interest given to a child who has a child living at testator's decease. Jarman thinks¹ that the 1 Vict. c. 26, does not apply to bequests to children as a class. But the plain words of section 32 seem to imply the contrary. Children taking under such a section appear to be in by descent, not by purchase. A similar inference seems to apply to the analogous acts in the United States.

According to the old rules of chancery, all gifts by will lapse, if the donees die in the lifetime of the testator. But, if any of the issue of the legatee be living when the testator dies,² there is no lapse in any of the following States: Pennsylvania, South Carolina, Virginia, Maryland, Massachusetts, Connecticut, Vermont, New Jersey, Mississippi, Maine, or Rhode Island.³

In Maryland there is the salutary law that there never is a lapse.⁴ The provision contained in New York Revised Statutes,⁵ however, applies only to bequests to children, or lineal descendants of the testator,⁶ but the section applies to past wills, if the testator survived the period of the passing of the Revised Statutes.⁷

An intestacy was considered to occur in *Nightingale v. Sheldon*⁸ under the following circumstances:—A. devised all his estate to his wife for life; if she died before his son I. arrived of age, then to his daughter A. until I. came of age; at that time the estate to be equally divided among his three children in fee, or to the survivors of them if either should die without issue, and if all his children should die without issue, and neither

¹ Vol. I, 313.

² Prince's Dig. 256.

³ 4 Kent, 542; note, 526; see Redfield on Wills, Vol. II, 174.

⁴ 4 Kent, 526.

⁵ Vol. II, 66, § 52.

⁶ *Armstrong v. Moran*, 1 Bradf. 314. ⁷ *Bishop v. Bishop*, 4 Hill, 138.

⁸ 5 Mas. 336.

should survive him, then to her in fee. All the children died in the lifetime of the wife, but two of them left issue who survived her. It was held that owing to the doubt of the testator's intentions, and from the omission to provide for the event which happened, an intestacy was the result. Yet the issue appear to have taken implied estates tail by purchase under the clause, "If either of them should die without issue."

The doctrine in *Maybank v. Brooks*,¹ that a gift to A., his executors, administrators, or assigns, may lapse, has prevailed, even though the fact that the legatee was dead at the time of making the will was known to the testator. But, this rule would hardly be followed in America.

Where there is a gift to several, not as a class or as joint tenants, but by name or as tenants in common, the gift to each is specific, and, on a lapse, falls to the heir.² In *Jackson v. Roberts*,³ it was held that there is no lapse in the United States of a gift in joint tenancy or even in a tenancy in common, if given to a class.

In *Downing v. Marshall*,⁴ the devise was to A. for life, and to his heirs, if he dies leaving issue, but if he dies without issue, then over to the testator's nephews and nieces. Though A. died in the lifetime of the testator, yet the remainder to the nephews and nieces did not lapse, as it was intended to be independent of the time when A. died. But where the devise was that the executors should apply the property to such charitable uses as they should think best on the death of the wife, this gift was held to lapse by the death of the wife in the testator's lifetime.⁵

¹ 1 Br. C. C. 84; see 1 Roper on Legacies, 467.

² *Hyatt v. Paysley*, 23 Barb. 285.

³ 14 Gray, 546.

⁴ 23 N. Y. 366.

⁵ *Fontain v. Ravenel*, 17 How. U. S. 369.

In *Green v. Dennis*,¹ the heir was preferred to a residuary devisee as to a void devise. This case, therefore, is opposed to the common notion that there is any difference between lapsed and void devises as to the rights of the residuary devisee. Yet the residuary devisee attracted a contingent interest which failed in *Hayden v. Stoughton*.² The law, therefore, on this point varies in the different States, and perhaps is not yet quite settled in any. Lapsed legacies fall into the residue. Lapsed devises do not, because they are specific—they fall to the heir. In those States where all wills speak only from the death of the testator, it is doubtful whether the old doctrine of lapse will be still applied or not. Every devise of land, however, is specific, so that the old rule would still seem to apply, especially as land is only a secondary fund to the general creditors. This appears to be the opinion in England, though not in the United States.³

Construction has given to residuary devises, in some States, the effect of including lapsed and void devises.⁴ But, in most States, if several devisees take not as joint tenants, but as tenants in common, a lapse of the share of any of them predeceasing the testator occurs for the benefit of the heir. The lapse of a particular interest, however, does not affect ulterior limitations.⁵

If A. bequeaths his property according to the uses of B.'s will, and B.'s devisees die after the death of B., but before the death of A., there is a lapse.⁶ This decision,

¹ 1 Conn. 292; see *Tongue v. Nutwell*, 13 Md. 415; see *Van Kleeck v. Refd. Dutch Ch.* 6 Paige, 600.

² 5 Pick. 528.

³ *Prescott v. Prescott*, 7 Met. 146; see *Van Kleeck v. Dutch Church*, 20 Wend. 499; *supra*, c. 24, § 4.

⁴ *Graighead v. Given*, 10 Serg. & R. 351.

⁵ *West v. Williams*, 15 Ark. 682.

⁶ *Colsha v. Cheese*, 7 Hare, 236.

however, seems to be contrary to principle. For as B.'s will is incorporated by reference in A.'s, the will of A. speaks expressly not from its date nor from A.'s death, but according to the context of B.'s will and its date of operation, which is the date of B.'s death. The principle, indeed, of the decision in *Maybank v. Brooks*,¹ tends to support the ruling in *Colsha v. Cheese*.

A testator is not presumed to provide for a case of lapse, in the absence of any express or implied statement to this effect. Accordingly, a mere legacy to a debtor of the amount of the debt, may lapse, and is not a remission of the debt. But it cancels the debt, whether the creditor survives, the testator or not,² if there are words used not only of bequeathing or giving, but of forgiving or remitting.³ The intention relates then to a present, not a future favor, although revocable in either case. If the testator directs his executor to deliver up the security, the legacy will not be subject to lapse.⁴ A general provision for creditors seems intended expressly not to lapse.⁵ Where property is given to A. if he survive testator, and both are drowned together at sea, the next of kin of the testator, and not of A., will take, if they fail to adduce any evidence of A.'s survivorship,⁶ as the burden of the proof of survivorship is on them. In France, the presumption of survivorship in such cases is regulated by express enactment. Although, if a person named devisee is dead at the time of making the will, this, as a rule, causes a

¹ 1 Br. C. C. 84.

² *Sibthorp v. Moxton*, 1 Ves. Sen. 49; *South v. Williams*, 12 Sim. 566; see *Roper on Legacies*, 470-7.

³ *Elliott v. Davenport*, 1 P. Wms. 83.

⁴ *Sibthorp v. Moxton*, 1 Ves. Sen. 49.

⁵ *Philips v. Phillips*, 3 Hare, 281.

⁶ *Underwood v. Wing*, 19 Beav. 459.

lapse; yet, if the devise is to one or his heirs, or even to one and his heirs, the word heirs may, on the context, be held to be substitutional.¹ However, if standing alone, it will be deemed merely a word of limitation.² On the lapse of a devise for life, any remainder or executory gift, if vested in interest, becomes vested in possession on the testator's death.³

The term lapse is sometimes used in the United States as synonymous with failure. In England, the term is confined to denote only the particular kind of failure caused by the beneficiary dying before the testator.

In *Whitehead v. Lassiter*,⁴ under a bequest to testator's widow for life, remainder to the testator's children "now living," the children of a son who predeceased the testator were held to take. Judge Redfield⁵ seems to think that this was properly a case of lapse. The words now living, indeed, do not give vested estates at once to the persons so designated. As to them the will operates, according to the scriptural rule, only from the death of the testator. Yet, the decision referred to is an error in the right direction. The next case referred to by the judge—*Bond's Appeal*—would seem to be still more open to the objection put by the judge, but that the word heirs in America is readily construed as a word of purchase.

Latterly, under a gift to one for life,⁶ and after his death to his children or his heirs, the word "or" is construed literally, so as to render the subsequent gift

¹ *Davis v. Taul*, 6 Dana, 51.

² *Dickenson v. Purvis*, 8 S. & R. 71.

³ *West v. Williams*, 15 Aik. 682; *Martha May's Appeal*, 41 Penn. St. 512.

⁴ 4 Jones Eq. 79.

⁵ Vol. II, 66.

⁶ *Vanordall v. Van Derventer*, 51 Barb. 137; 1 Denio, 168; 18 N. Y. 418.

substitutional in case of the lapse of the first.¹ Such, indeed, is obviously the natural meaning of the word "or" in most limitations of the kind referred to. However, the courts do not studiously strain against a construction which is defeated by lapse, although they favor the vesting of interests. The distinction is between general rules of construction, and the moulding of these rules by the event. This is never done. Lapse, therefore, never affects construction.

¹ *Finlason v. Tatlock*, 18 W. R. 332.

CHAPTER XXVII.

SUGGESTIONS TO TESTAMENTARY DRAFTSMEN.

Questions of construction range themselves into one of three classes, according as the difficulty relates to the words of direction, the gift, or the beneficiary. A very accurate description of the subject or object of gift is sometimes not in the power of the testator. But he never can have any adequate excuse for using a merely precatory term. Such phraseology should be carefully avoided by him. He should speak with no uncertain sound of desire or suggestion, but should use the words "will," "give," "devise," or "bequeath," or all or several of these terms together. Unless the will is thus explicit, and the trusts plainly appear to be imperative, they may be construed, at the present day, as resting in the discretion of the trustee. At all events, a will that is doubtful in this respect is certain to be litigated in the present supposed shifting state of the authorities, both here and in England, respecting the phraseology necessary to create a precatory trust or trust-power. If the testator really wishes to give a trustee a discretion, there is no reason of law or precedence why he should not do so. Only he should then state explicitly that the trust is discretionary, and not imperative.

An uncertainty, too, in the words of disposition or in any abstract phrase, such as "property," "effects," &c., is usually much more serious than where the inaccuracy relates to a concrete subject or object of gift; because ambiguities of the latter kind are open to

parol evidence. But no abstract word can be thus explained.

The remarks I have suggested respecting the use of disposing terms are also applicable to the other two sources of difficulty—the subject and object of gift.¹ No general rules can dispense with the necessity for great care and attention on the part of the draftsman in respect to each element of the testamentary gift. He should, if possible, leave nothing in doubt. Indeed, each rule of testamentary construction or equitable presumption merely denotes a common class of difficulties, which the courts can repress only by the most rigid fetters. Therefore, all doubt should be precluded as to the parcels or property, whether real or personal, which the testator intended to convey: nor should room be left for litigation upon any one of the points discussed in the preceding chapters.

Where the draftsman has time to elaborate the instrument, he should consult a treatise on wills as to the points most fruitful of litigation in the particular matters he is considering. A reference to the index or table of contents, and, at all events, a very short survey of the text of any of the leading treatises, will give him the necessary information. General rules and celebrated cases are lights and buoys that are only placed near the quicksands where testamentary wrecks are most frequent. A reference to the chart of past accidents is, however, the best means of avoiding disaster in the future.

The testamentary draftsman should be cautious in his use of technical terms, especially if the testator is likely to survive for any considerable time; otherwise, any subsequent change of the will may greatly confuse the preceding limitations, and change terms of purchase into words of limitation, or conversely.

¹ *Supra*, c. xvii, § 2.

The quantity of estate, and the nature of the donee's interest—whether it be legal or equitable, for years, life, in tail, or fee, and whether it be by purchase or limitation—should also be left free from doubt.

The subject of gift, if specific, should be accurately indicated and carefully defined by exact description.¹ If the whole of the fund or property be given, this should be clearly expressed.² A reference to the deed under which land was conveyed to the testator or his ancestor is perhaps the best mode of describing an estate, as, for instance: "I devise my estate at Appleton, in as full and ample a manner as it was conveyed to me by a deed bearing date, &c., and made between," &c. The description in the deed will, by this reference, be incorporated with the will. A reference to occupancy alone is, of course, too precarious, as tenants are often changed. Such allusions, too, are generally incomplete. If a reference of this kind is made, care should be taken to state whether the alleged occupants have in their possession all the devised premises or not.

The rents and income of the testator's property should be expressly disposed of, in case any of the gifts is limited on a contingency which will postpone vesting.

A testator should distinctly declare whether he intends each devise or bequest to be construed with reference to the date of his will, or of his decease.

Where the gift is not of "all goods and effects," the subjects of the special donation should be copiously and accurately enumerated, and nothing should be left to legal inference with respect to the nature of the gift,—whether it be specific, demonstrative, or general, or how it is to be affected by ademption, enhancement, or other probable change in the testator's circumstances before his death.

¹ *Supra*, c. xxiv, § 2.

² *Supra*, Part I, 106, 163, *et seq.*

Where a gift of "furniture," "household effects," "farming stores," or of any other personal estate, at a particular place, is intended to be general, the testator should add negative words, thus: "I give all my personal estate at A. to B., and this gift is subject to no exception whatever."

Negative words are still more necessary where the subject of a bequest is intended to be exonerated, for the benefit of the legatee, from some charge affecting it.¹ A primary fund for payment of debts should, therefore, be accompanied with negative words, exonerating the general personalty, when such is the testator's intention. Especial care should be given to this point, and where land is subject to a mortgage or other charge, the devisee's rights in respect to exoneration should be most plainly expressed in both affirmative and negative terms. Devising land "subject to a mortgage" will still, in most of the United States, but not in England, entitle the devisee to exoneration out of the testator's general personalty. In proportion as the rule of construction is strong and technical, and approaches the nature of a rule of law, such as the doctrine referred to, or as the rule in Shelley's case is in England, care should be taken to preclude the application of the doctrine, if the devise is intended not to be subject to its influence.

The donee should be identified by unmistakable terms. If the testator has a doubt whether his knowledge of the donee's person and description is accurate, he should be copious on this head, as the more marks he assigns, the more easily will identification be made, unless—which is very improbable—he is wholly unacquainted with the person and circumstances of the object of his bounty.²

Where the testator is leaving a young widow, she

¹ *Supra*, 239.

² *Supra*, Part I, 167.

ought to get but little discretionary power as to the estate. She ought not, however, to be subjected to any restrictions against marriage. Any discretion given her should be exercisable only by will. This would prevent the children, if their shares are made subject to her appointment, from hastily disposing of their property, and, on the other hand, would prevent the mother from showing any undue partiality to such of her children as might combine with her to defeat the rights of their brethren. This is perhaps an improbable contingency, but it should not be ignored.

Gifts for the separate use of a married woman should be carefully worded, so as to exclude marital rights and anticipation, and to confer a power to appoint only by will, if any apprehension is entertained of encroachments on the part of the husband.

The widow or trustees should have the power of advancing a certain proportion of the bequests to the children, for their education, and even for trading purposes, after the children reached eighteen.

No ambiguity should be apparent in the will as to when the shares of children vest¹—whether their descendants are to take substitutional gifts, in case of lapse or other failure of the children's shares—what failure of issue is contemplated—whether a condition is precedent or subsequent—what is to be the devolution of the property, if the beneficiaries do not survive in the order primarily expected—and to what period the reference to survivorship applies. If the personalty is intended to devolve in strict settlement, the non-vesting clause should be inserted, so that on the death of any child under age, and without issue, his share should go to the next in remainder under the will, and not to his next of kin.²

¹ *Supra*, c. xxiii, §§ 1, 4.

² *Supra*, c. xi.

Gifts to a class, or the survivors of a class, with or without cross-remainders, should also be carefully expressed, so as to denote the particular objects the testator had in view, and, as in the case of children, whether they are to be those who survive himself, the tenant for life, or other members of the class,¹ and whether the issue (if any) of deceased members of the class are to stand in the place of their ancestors under the limitation.

Provision should also be made for future children of the testator, or of any such of his donees, if they are objects of the testator's bounty, unless their ancestor takes a precedent life interest in the property given to them.

Every circumstance likely to occur that may either revoke or materially affect the construction, such as marriage or the birth of a child, should be considered by the testator.²

Codicils should plainly indicate how far the will was intended to be revoked or modified.

Nothing should be left in doubt as to whether devisees take as joint tenants,³ or in common, or in common for life with remainder to the survivor.⁴

The testator himself should be personally consulted before the instructions given to the counsellor-at-law are embodied in the final instrument.

It is hardly necessary to add that, besides expressing the special will of the testator, free and clear of all manner of doubt, the draftsman should take care not to violate any rule of law, but to inform the testator of the extent to which alone his wishes can be carried, when these tend to contravene any principle of public policy, rule of law, or any doctrine, that is not a mere rule of construction or administration.

¹ *Supra*, c. xvi, § 3.

² c. i, § 3.

³ c. ix.

⁴ c. xvi, § 1.

INDEX.

A.

- ABATEMENT of legacies on a deficiency of assets, 353.
- ABOLITION of estates tail by statute, 117.
- ABSOLUTE interest in personalty, 122.
- ABSOLUTE trust, when not cut down, to mean a mere request, 227.
- ABSOLUTELY, meaning of the word, 107, 218.
- ACCIDENT. See MISTAKE.
cannot affect construction, 52.
- ACCRUED interests, what words carry, 196.
“share and interest,” 196.
where the property is to devolve in one mass, 196.
to the survivor of several donees, 195.
not moulded by reference to original shares, 197.
- ACCRUING shares, relations of, to primary shares, 290.
- ACCUMULATION, trusts for, 386 *et seq.*
remoteness of, 386.
of residue, 388.
in New York, 388.
- ADEMPTION of specific gifts, 18; 19.
how affected by the Wills acts, 19.
is provable by parol evidence, 58.
when not effected, 361.
See LEGACY, SPECIFIC DEVISE, SPECIFIC BEQUEST.
of legacies explained, 360.
a distributive share does not work an ademption, 367.
- ADMINISTRATION of realty and personalty *pari passu*, 243.
of personalty in cases of election, 250.
- ADOPTION, what is an adoption of a mortgage, 233.
- AFFINITY, connections by, take when, 320, 321.
- AFTER-ACQUIRED land passes by will, when, 21.
passes by republication of will by a codicil, 5.
- AFTER-BORN children, as regards the rule in Wild’s case, 314.

- "AFTER-PAYMENT of debts," effect of the phrase in charging land, 241.
- AGE, death under, 125.
- ALABAMA, conveyancing in, 116.
- ALIEN, rights of, to proceeds of sale of land, 399.
 naturalized, 399, 400.
 devise to, 174.
 will of land by, 14.
 of personalty by, 14.
- ALIENATION, a restraint against, may be imposed on a tenant for life or years, 389.
 of property of married woman, 389.
 of leases, 389.
 in the various States, 390.
 restraint against, imposed on a tenant in fee, 391.
 is in principle illegal, 391.
 but is allowed in some States, 391 *et seq.*
 in mortmain, 392 *et seq.*
- ALIEN FRIEND, testamentary rights of, 16.
- "ALL" construed "any," 38, 196.
- "ALL and every," meaning of the phrase, 290.
- ALTERATION of words, when allowed, 38 *et seq.*
- AMALGAMATION of estates is favored in law, 131.
- AMBIGUITY aided by evidence and construction, 47, 49.
 especially in American courts, 49.
 several questions in cases of, 49.
- AMERICAN LAW, principles of testamentary, 13, 22 *et seq.*
 relations of, to law of England, 22.
 to English case law, 3.
 exceptions thereto, 22.
 in the Supreme Court of the United States, 23.
 of parol evidence, 21, 51, 53.
 in cases of fraud, 54.
 as to the meaning of the terms "real," "personal," "land,"
 "effects," &c., 59.
 meaning of terms of description in, 65 *et seq.*
 as to the rule in Shelley's case, 93, 104.
 as to the rule in Wild's case, 101.
 of entails, 116, 117.
 as to the construction of the phrase "dying without issue,"
 123, 126.
 "leaving no issue," 119, 124.

AMERICAN LAW—*Continued.*

- the American statutes on these points differ from the English, 129.
- of joint tenancy, 137.
- of remainders, 140.
- is the same as that of England as to the primary liability of personalty to debts, 238.
- in leaning towards the vesting of interests, 256.
- in favoring the heir, 86.
- in adopting the rule in Wild's case, 101.
- differs from that of England as to the application of the rule in Shelley's case, 93, 104.
- semble*, also as to the context required to convert property absolutely, 163.
- as to the rights of the survivor of several beneficiaries, 195, 203.
- precatory trusts, 214, 217, 219.
- illusory appointments, 230.
- the rights of a devisee of a mortgaged estate to exoneration, 237.
- the admission of parol evidence on the question whether a legacy is charged on land, 238-9.
- the effect of a direction to pay debts in charging lands, 240.
- marshalling for legatees, 260.
- vesting of legacies, 260, 265.
- trusts for the separate use of a male, 287.
- gifts to a class, 295.
- computing survivorship, 296.
- in regarding heir as a purchaser, 102 *et seq.*, 304.
- as to a devise to testator's heir, 400.
- in not executing charitable uses *cy pres*, 409.
- in holding that a direction to executors to pay debts does not charge land, 240.
- unless the devise is "after payment of debts and legacies," or these are to be "first" paid, 240.
- in presuming that a widow elects in favor of the will, 246.
- as to dower, 248.
- in admitting parol evidence to raise a case of election, 248.

"AND," read "or," 35, 38.

ANNUITY survives to executors, 261.

bequest of annuity, not existing previously, confers only a life interest, 91.

Aliter, if a fund, such as public stocks, be appropriated for the annuity, 91.

charged on land, 178.

trustees for, *Id.*

apportionment of, 242.

See LEGACY.

is primarily payable out of the personalty, 238.

even when charged on both realty and personalty, 238.

with dower, 251.

to be capitalized, when, 157.

specifically bequeathed in settlement, 158.

APPOINTMENT. See POWER, TRUST.

trust in default of, 224.

the first devisee under, takes the legal estate, 174.

should not be to trustees, when, 174.

cannot be made to a deceased child, 229.

mode of evading this difficulty, 229.

and deed creating the power, are but one integral instrument, 94, 95.

under a will, construed as part thereof, 9.

"APPURTENANCES," meaning of the word, 64, *Id.*

in America, 64.

ARTICLES. See MARRIAGE ARTICLES.

are expounded like executory trusts in wills, 24.

ASSETS, administration of, 353 *et seq.*

distinction between legal and equitable assets, 353.

abatement if assets are insufficient, 353.

no abatement of specific legacy, 356.

order of administering, 354.

lands are auxiliary, 355-6.

when marshalled, 356.

test of the right to marshal, 357.

who entitled to marshal, 358-9.

ASSIGNMENT. See ALIENATION.

"ASSIGNS," of use in covenants, not in grants, 301.

ASSUMPSIT, action of, when available to a legatee, 242.

"AT HOME," when property is said to be, 252.

B.

"BALANCE OF ESTATE," meaning of the phrase, 238.

BENEFIT of survivorship, 196.

"BEQUEATH," meaning of the term, 62.

BEQUEST. See PERSONALTY.

to A. for life, and, if he die without issue, over, 154.

for a particular purpose, is generally absolute in effect, 224.

of mortgages or securities for money, 187.

effect of, on devisee of a particular mortgage
187-8.

"BESIDES," effect of, 351.

BOND, election in case of, 251.

bequest of principal of, does not carry interest, 71.

is not a novation or fresh adoption of a mortgage, 234.

BONUSES. See DIVIDENDS.

elucidated, 340.

BOOKS will not pass manuscripts, 73.

may pass under copyright, 73.

C.

CANAL SHARES are interests in land, 396.

are not "securities," 72.

CAPACITY TO WILL, how proved, 14.

burden of proof of, 15.

in cases of fraud, 15.

at common law, 13, 14.

of married women, 13.

as to their separate estate, 13.

or under a power, 13.

under State laws, 13, 14.

question of, is not one of construction, 12.

but may indirectly be such, 13.

CAPITA. See PER CAPITA.

CASE LAW of wills, to be important, must be recent, 48.

of England, recognized here, 3.

CHARGE. What is a charge of debts, 33.

on land, 240 *et seq.*

CHARGE OF DEBTS passes a fee, when, 81.

not if there be an express life estate, 81.

always impliedly attaches to the land, if expressly imposed
on devisee, 81.

under a charge, 178.

its effect on the estate of trustees, 178.

effect of, on a general devise, 79.

on land, of a certain percentage of the value of the estate, is
a general legacy, 339.

on gift does not affect vesting, 263.

to be raised out of rents and profits, gives a power of sale,
90.

especially if the charge is secured by a term of
years, 90.

aliter, if the payments are not to be made imme-
diately, 90.

if express, makes the land the primary fund for payment,
232.

of a mortgage debt, 235.

if these are specified, will bind purchaser from de-
visee, 237-8.

gives a fee, when, 242, 243.

construction of, not affected by State statutes, 243.

CHARITABLE USES, statute of, 392.

its relations to mortmain, 392.

has not been re-enacted in all the States, 392.

but these have a common law jurisdiction to ad-
minister charitable uses, 395.

in New York, 393, 406.

are never void for uncertainty or remoteness, 395.

definition of, 401.

doctrine of, rests not wholly on the stat. of Eliz., but also on
the common law, 401.

are administered by courts of equity, 401.

are free from all taint of perpetuity and uncertainty, 401-2.

unless when mixed with other uses, 406.

appointment to a corporation for, 402.

the statute prevails by construction in Massachusetts and
Pennsylvania, 402.

also in North Carolina and Kentucky, 402.

the statute has not been expressly re-enacted in any State,
402.

CHARITABLE USES—*Continued.*

and has been repealed in New York and Virginia, 402.

examples of, 402 *et seq.*

assets marshalled for, when only, 398, 404.

no restriction as to bequests for, 405.

aliter, as to devises of land, 404.

decisions under the stat. of Eliz. are important even in those States where the statute has not been adopted, 405.

unappointed gift to, will be appointed by the court, when, 405.

not executed *cy pres*, 405.

relation of the Constitution to gifts to charitable uses, 407.

if void at first, yet may acquire validity by presumption 399, 407.

examples of uses not charitable, though resembling such, 407-8.

surplus for, 409.

blank for, invalidates, 409.

and causes a resulting trust, 410.

charged on realty and personalty, 399.

not favored here as much as in England, 21.

trusts for, not executed *cy pres* in America, 162.

CHATTELS. See PERSONALTY.

CHATTELS REAL. See TERM OF YEARS.

CHILD. See CHILDREN, ILLEGITIMATE CHILDREN.

gift by parent to, 364, 365 *et seq.*

rights of, in respect to revocation of will, 7.

"surviving," 205.

issue of deceased, favored, 205.

mode of appointing to a deceased child, 229.

CHILDREN, immediate gifts to, 289, 290.

deferred gifts to, 289.

when substituted for their parents must survive, the period of distribution, 290.

this rule peculiar to gifts to children, 290-1.

"without having children," 290.

gift of \$5,000 to all the children of A., payable when they attain twenty-one, 291.

gift of \$100 to each of A.'s children who shall attain twenty-one, 291.

CHILDREN—*Continued.*

distinction between the last two gifts, 291.

“the present-born children of A.” must still survive the testator, 292.

to A., “and if he die without children, over,” gives A. the absolute property, subject to the contingency specified, 293.

estates sought to be implied for, 293.

gift “to the children of A. on marriage,” becomes distributable when any one of them marries, 294.

aliter, if the gift is to them at twenty-one, 294.

reason of the distinction between the last two instances, 294.

to A. for life, remainder to the children of B., 294.

general rule as to gift to children after a life estate, 294.

rents meantime fall to the heir or residuary devisee, 295.

“now living” refers to the date of the will, 295.

to A.’s children, their heirs and assigns, 296.

to grandchildren on their marriage, 296.

take vested interests, when, 297.

after born, as regards the rule in Wild’s case, 314.

if illegitimate, never take if legitimate could have been intended, 315.

illegitimate take, when, 315, 316.

primary meaning of the term in the American States, 310.

meaning of the term is controlled by the context, 310.

construed as heirs of the body, when, 95.

“dying without issue,” 126.

children, if posthumous, still have plenary rights, 311.

adopted, are not the children of the adopter’s wife, 311.

take *per capita*, when, 324 *et seq.*

CHOSES IN ACTION, comprised under “property,” 61.

CIVIL WAR, its relations to testamentary rights, 16.

CLASS, members of, how reckoned in America, 295, 296.

sometimes means only certain individuals known to testator, 288.

ascertained at period of distribution, 288.

period for ascertaining under an immediate gift, 288, 289.

under a deferred gift, 289.

of children, 289 *et seq.*

limitation of a residue to a, 290.

CLASS—*Continued.*

no general rule as to vesting can be applied to gifts to classes, 290.

construed in a peculiar way when "children," "brothers," &c., are the beneficiaries, 290.

when "all and every" is added, 290.

of children substituted for their parents, 290.

if the whole charge is increased, the class is computed before the period of distribution arrives, 291.

definition of, when there are none at testator's death, 292.

interest falls into residue in such case until the first taker appears, 293.

CLAUSE, effect will, if possible, be given to each clause in a will, 30, 33.

this illustrated by an express charge, 33.

last prevails, of several inconsistent ones, 30.

will be construed in a reasonable way, 30.

effect of a void clause on rest of will, 33.

every clause will be rendered effectual, if possible, 39.

else the last prevails, 39.

the same clause may receive two different interpretations as to realty and personalty, 35.

effect of void clause on will, 55.

if separable from others, these are valid, 55, 56.

CODICIL, republication of will by, 5.

effect of, *Id.*

with respect to legacies adeemed or satisfied, 5.

partial revocation by, 6.

effect of, as to republication of will, 9.

in England, 9.

as to dower, 9.

and will are one instrument, as to the rule in Shelley's case, 94.

trust in an illegal codicil does not affect prior will, 186.

COMMON. See TENANCY IN COMMON.

COMMON LAW, doctrines of, are always important, 231.

prevails in the United States, 1.

how far in Virginia, Ohio and Arkansas, 2.

of Louisiana, 2.

relations of, to Federal jurisprudence, 2.

the heir was not liable to debts at common law, 237.

common law title extinguishes equitable one, when, 298.

CONDITION. See EXECUTORY INTEREST, LEGACY.

was a common law mode of defeating an estate, 267.

cannot be reserved on a grant in fee, 267, 275.

gives a power of re-entry, 267.

cannot transfer an estate in a deed, but can in a will,
267.

the ulterior estate is termed a shifting use, executory
devise, or conditional limitation, 267.

is destroyed by a release for once in some States, 273.

this is the common law rule, 273.

but is now abrogated in most States, 285.

comprising various acts, 273.

must be performed within a reasonable time, unless the con-
text is to the contrary, 273.

if after an estate tail, may be defeated by the tenant in
tail, 273.

is express or implied, general or special, precedent or sub-
sequent, real or personal, 270, 273.

distinctions between these, 271, 273-4.

when impossible, 274.

if repugnant to the nature of the estate, or to its incidents, is
void, 274.

examples of, 268 *et seq.*

attached to a particular estate may not affect a remain-
der, 269.

illegal and void, examples of, 270, 274.

binds beneficiary, 270.

distinguished from a limitation and a covenant, 270.

is virtually a trust, 270.

is construed subsequent, if possible, 270.

if of the nature of a consideration, is usually precedent, 272.

"that beneficiary shall not frequent public houses," is
valid, 272.

is within the rule against perpetuities, 275.

at common law, 268.

law of, much altered by construction, 268.

in terrorem, 268.

when deemed precedent, 272.

is restraint of assignment, 274.

in case of a fee, 275, 391.

against alienation by a male, 278.

against aliening when void, 277 *et seq.*

CONDITION—*Continued.*

- in restraint of marriage, 280 *et seq.*
 - in the civil law, 281.
- against the remarriage of a widow, 282.
- as to land, 282.
- against celibacy, 283.
- abridging religious liberty, 283.
- that legatee shall not dispute will, 284.
- a legacy to a church, if C. continues its pastor, is valid, but
 - is given on a condition, 412.
- when relieved against in equity, 285.
- is apportionable, 285.

CONDITIONAL FEE, instances of, 124.

CONFLICT OF TESTAMENTARY LAWS arising from various statutes, 8.

CONSENT, what is a sufficient consent to marriage, 284.

of husband to wife's will, 13, 14.

must be to a particular will (in the concrete),
14.

CONSIDERATION invalid, distinguished from invalid covenant, or clause, 56.

CONSTITUTION, relations of gifts to corporations to, 406.

bequests against the spirit of, are void, 413.

CONSTRUCTION, what is testamentary construction, properly so called, 25.

cannot be aided by revoked will, 58.

has not much altered the old rules respecting general devises, 78.

rules of, distinguished for presumptions, 160.

rules of, distinguished for those of law, 81, 152, 266,
274.

rules of, subject to testator's intention, 120.

general principles of, 22 *et seq.*

cy pres is not adopted in respect to charities, 22.

principles of, adopted by Supreme Court of United States, 23.

causes of the difficulties relating to testamentary, 27.

equitable, 34 *et seq.*

reason why wills are equitably construed by all courts,
35.

cy pres applied to remote limitations, 36.

cannot be affected by accident, 52.

CONSTRUCTION—*Continued.*

is preferred to parol evidence, 53.

rules of testamentary construction are essentially the same
as those relating to the construction of
contracts, 24.

principles of American, 22 *et seq.*

has altered the old rules of wills here, 17.

secondary and *cy pres*, 378, 383, 385.

not affected by events, 383.

cy pres, 63.

cannot be directly affected by fraud, 55.

CONTEXT may control domiciliary law, in what respects, 11.

is the chief guide to the construction of a will, 23.

may regulate the meaning of all terms in the will,
62.

overrides rules of construction, 120.

CONTINGENCY. See CONTINGENT INTERESTS, REMAINDER.

may affect a whole series of remainders, 257.

rule respecting, 257.

relating to donee, 260.

to subject of gift, 260.

does not prevent the gift from being transmissible,
264.

CONTINGENT INTEREST of personalty, 257.

examples of, 255.

gift to persons living at a certain period is a, 257.

substitutional gift is not a, 257.

CONTINGENT REMAINDER, often hard to be distinguished
from a vested one, 139.

examples of, 140.

limitation to trustee to preserve, &c., 139, 140.

this limitation is, in principle, itself contingent, 139.

the trustee may defeat remainders, 143.

meaning of the word "heir" in, 297.

in personalty, 153, 154.

CONTINGENT RESIDUARY BEQUEST, carries income, when,
347.

distinguished from a contingent residuary devise, 348.

CONTRACT FOR SALE, effect of rescission of, on devise,
64.

CONTRACTS are construed like wills, 24.

CONVERSION of property explained, 155.

when the proceeds of sale are to be divided, the beneficiaries take their shares as personalty, 155.

if the trusts fail, the property is still changed from real to personal as directed, 155.

money directed to be laid out in land is realty, 155.

as to powers arises only under an imperative trust power 156, 157.

realty, subject to a discretionary power to convert, pays no legacy duty, 156.

not deemed intended to avoid an illegality, 156.

of land into land, 156-7.

“with consent,” the fund is personal, 157.

is only deemed to be for the particular purposes mentioned in will, 163.

unless the context is to the contrary, *Ib.*

what context is insufficient to repel the presumption, 163.

semble the American rule is different, 163.

does not let in simple contract creditors, unless these have rights otherwise, 164.

the beneficiary is entitled to the property at once, 157.

when deemed to be made, 158.

property retains its character until converted, 158.

when may beneficiary elect against the conversion, 159.

CONVEYANCING, rules of, how far applicable to wills, 32.

CORPORATION, gifts to, 46, 392 *et seq.*

in New York, 393 *et seq.*

devise in trust for, 394.

devise to foreign, 16.

taking to the use of another corporation or of an individual, 174.

COURT, access to, open to all, 52.

places itself in position of testator, 53.

does not discountenance a construction involving a lapse, 425.

aliter, if it divests an interest, 425.

the distinction explained, 425.

inclines against double gifts or portions, 365.

inclines to regard interests as vested, 257.

and conditions as subsequent, 257.

"COUSINS," comprises only first cousins, 323.

COVENANT, not to execute a power, 208.

CREDITOR, gift to, 364.

CROSS REMAINDERS. See REMAINDER.

implication of, how precluded, 145.

this implication is most convenient, 146.

under executory trust, *Id.*

may be implied between classes as well as individuals, 146.

implication of, requires subsequent words, 147.

"with remainder," sufficient for this purpose, 147.

semble, the implication applies to executory devises in fee
and to bequests, 147.

contra, Jarman, 147.

his opinion on this point examined, 147,
148.

CUMULATIVE LEGACY. See LEGACY.

QY PRES. See CONSTRUCTION, WILL, INTENTION, PERPETUITY.

construction applied to remote limitations, 36.

none for charities, 21, 162, 395, 396.

in cases of perpetuity 378, 383.

not applicable to personalty, 151, 152.

D.

DATE, for construing a will, 16.

DEATH. See DYING WITHOUT ISSUE.

limitations dependent upon, 120.

DEBTOR, legacy to, 361, 369.

"DEBTS," did not bind heir at common law, unless they were
special, 237.

did not, at common law, bind land, even during debtor's
life, 231.

this rule altered under Ed. I., *Id.*

bind personalty primarily, 231.

hence, the heir is said to be favored in law,

effect of charge of debts on general devise, 79.

if charge is imposed on the person of the devisee,
and not confined to the land, 79, 80.

principle of the distinction, 79.

purchaser's liability for, 237-8.

trust to pay, 160.

estate taken by trustees to pay, 177, 179.

“DEBTS”—*Continued.*

meaning of the word, 72.

passes bonds, bills of exchange, and cash balances in banker's hands, 72.

do not pass under “money,” 72.

charges estates tail, in what States 116, 117.

a direction to pay charges any land devised to executors, 240.

when paid *pari passu*, 354.

DECEASED. See CHILD, ISSUE.

declarations subsequent to the *res gestæ* are admissions, 186.

DEEDS are construed like wills, how far, 25.

premises of, may be controlled by *habendum*, 302.

uncertainty in, governed by same law as uncertainty in will, 47.

“to A. and his heirs male,” in a deed, 299.

“right heir,” in a deed, merely means “heir,” 300.

habendum in a deed properly contains the limitation of estate, or quantity of interest conveyed, 301.

how far open to a *cy pres* construction, 25, 26.

DEFAULT, trusts in default of appointment, 224.

DEFERRED GIFTS, become all payable together on the first vesting in possession of any one share, 294.

DEFINITENESS. See UNCERTAINTY, TRUST.

DEFINITION of a will, 4.

DELAWARE, rule in Shelley's case is only a rule of construction in Delaware, 103.

DEMONSTRATION. See DESCRIPTION, FALSE DEMONSTRATION, UNCERTAINTY.

DEMONSTRATIVE. See LEGACY.

legacy explained and illustrated, 330 *et seq.*

“DESCENDANTS,” will not include collateral relations, 307.

means issue of every degree, and these take *per capita*, 307.

DESCENT, effect of varying, 111.

imperfections of a title by, 113, 114.

preferred to purchase, 73.

DESCRIPTION, though inaccurate, may be sufficient, 42.

rule as to, stated in *Smith v. Smith*, *Id.*

DEVISABLE INTEREST, what is a, 19 *et seq.*

test of this question, 19.

of bankrupt, 20.

DEVISE, meaning of the word, 62.

rules as to, ought to be uniform throughout the United States, 77.

of wild land in Massachusetts, gives a fee, 77.

is executed by statute of uses, 173.

and may contain any kind of power, 175.

but appointee of special power must be an object of the power, 175.

Jarman's error as to the statute of uses, "forbidding the limitation of a use," 173.

lapse of legal estate in, 173.

to aliens or corporations, 174.

to uses, passes the legal estate, when, 174.

to the use of trustees, does not necessarily give them the legal fee, 174.

a general devise confers only a life estate in some States, 75.

with words of perpetuity give a fee, 75.

or if charged with deaths and annuities, 79.

this question not open to parol evidence, 75.

the statutory presumption not rebutted by a grant for repairs, 76.

for life, with power to convey the fee, gives only a life estate, 80.

after payment of a charge gives only a life estate, 80.

over, on failure of issue, gives a fee, 80.

in fee, subject to a general devise over, 80.

"to A. in trust for B. in fee," gives A. a fee, 80.

what is an implied devise in fee, 88.

for life, with a power of sale, does not give a fee, 88.

of the absolute interest, precludes remainders, 88.

to trustees to pay rents, 175.

to permit A. to receive rents, 175.

to pay, or permit A. &c., 175.

of land under a contract for sale, 183.

if contract fails, 183.

is not construed by the event, 183.

a general devise passes mortgage or trust land, when, 187.

of a particular mortgage, 187.

when an execution of a power, 208.

on limited trusts, with powers of sale or leasing, 179.

against heir, in New York, 259.

of "the plantation on which I now live," 82.

DEVISE—*Continued.*

in fee, subject to an exception, 82.

of "my property after my debts are paid," 83.

of the use for life, with a power of appointment, gives the fee, 83.

"to do and dispose of as he may think proper," gives a fee, 83, 84.

of "all the rest" of lands, does not pass a fee, 86.

DEWISEE not liable to debts prior to 3 & 4 W. & M., c. 14, 237.

nor to simple contract debts in England until 3 & 4 W. IV., c. 104, 237.

even now he is only secondarily liable in the United States, 242.

' rights of, when testator has no land, 20.

DIRECTION to pay debts, 179.

to convert property, 155 *et seq.*

DISCLAIMER consistent with vesting, 259.

DISCRETION in trustees as to time for converting property, 158.

of executors is subject to court, 52.

DISCRETIONARY POWER. See POWER.

does not work a conversion of property, 156-7.

• if unexecuted, is inoperative, 156, 211.

DISINHERISON. See HEIR.

DISTINCT GIFTS will be construed as distinct, 33.

DISTRIBUTION, period of, 261 *et seq.*, 289 *et seq.*

See CLASS CHILDREN.

words of, in relation to the rule in Shelley's case, 153.

implied beneficiaries under a power of distribution take in common, 228.

words of, in respect to issue and heirs of the body, 308.

DIVIDENDS belong to tenant for life, 340.

to specific legatee, when, 340.

DOMICIL, definition of, 11.

law of, in respect to wills, 10.

semble, does not govern devises, 10.

aliter, as to bequests, 10.

conflict of authority on these questions, 10.

arguments on the point, 10.

may be controlled by context, 12, 32.

Jarman's opinion as to domiciliary law, in respect to leaseholds, 11.

results of change of domicil, 11.

DOMICIL—*Continued.*

- of origin, 11.
- of infants, 11.
- fact of, may be proved by parol evidence, 12.
- law of as to testamentary capacity, 13.
- law of, in cases of election, 250.

DOWER, favored, 244, 245.

- when defeated, *Ib.*, 246 *et seq.*
- test of this, 245.
- with annuity, 251.

DOWER and THIRDS, meaning of, 246.

- when excluded, *Ib.*, 247.
- not excluded by an annuity, 247.
- in England, 247.
- has been much legislated upon in America, 248.

“DYING WITHOUT ISSUE” is construed in America as in England, 123, 127.

- where there is a change of debts, 123.
- means dying without heirs of the body, when, 123.
- “leaving no issue,” 124.
- when pointing to a failure at a definite time, 122.
- limitation dependent on, usually implies an estate tail in previous donee, 118.
- may render a limitation too remote, 118.
- where no estate is given to the propositus, 118, 119.
- in limitations of personalty, 119.
- of realty, *Ib.*
- exceptions to rule for construing, 120.
- reason of the rule for construing “dying without issue” as denoting an indefinite failure of issue, 121.
- followed by “after his decease,” 126.
- statutory construction of, 125, 129, 130.
- is open to much difficulty, 130.
- as interpreted by 1 Vict. c. 26, and the statutes of Virginia, Mississippi, N. Carolina, and New York, 128.
- when the old rule applies, 128.
- effect of, still may be determined by the context, 32, 129.
- to A and his heirs, and, if he die without issue, over; A. takes an estate tail, 128.
- American statutes respecting, 129.
- are controlled by context, 129.
- in relation to powers, 129.

E.

ECCLESIASTICAL COURTS used to give probate of wills of personally only, 9.

"EFFECTS," meaning of, 62, 67.

EJECTMENT, importance of legal estate in, 185.

ELECTION, principle of, 249.

corresponds to estoppel under a deed, 249.

how raised, *Ib.*

when confined to personalty, 70.

against conversion, 159.

when available, *Ib.*

its relations to a condition, 252, 253.

under will of married woman, 253.

margin for, narrowed by statute, 253.

by widow, 246.

where there is a general devise, 246.

may be raised unconsciously by testator, 250.

results of electing against will, 250.

not raised by a general devise, 250.

doctrine of, does not apply to creditors, 250.

by foreign heir, 250.

by next of kin, 251.

by dowress, 244 *et seq.*, 251.

by infant, 252.

how made, 252.

under defective will, 252.

requisites for, in the United States, 252.

cannot be raised by parol evidence, 250.

ELEGIT, estate by, is a chattel, 177, 179.

ENTAIL, what is a *quasi* entail, 21.

what words necessary to create, in a deed, 26.

ENTIRETIES, what is a tenancy by entireties, 93.

See **TENANCY BY ENTIRETIES**.

EQUALITY is equity, 245.

especially in America, 245.

EQUALLY DIVIDED, 105.

"EQUALLY TO BE DIVIDED," does not necessarily imply a fee, 82, 83.

but is some evidence thereof, 84, 85.

EQUITABLE CONVERSION. See **CONVERSION**.

EQUITABLE ESTATES are subject to rule in Shelley's case, 98.

devolution of, 20.

EQUITY, construction of will in, 34.

presumptions of, 34.

favors a tenancy in common, 134.

administers legacies in trust, 329.

follows the law, in administering assets, how far, 353.

follows the law in deductive, not inductive, respects, 21.

maxims of, 155, 174, 185.

never wants a trustee, *Ib.*

common law jurisdiction of, as to charitable uses, 395.

follows the law in presuming a joint tenancy, 134.

EQUITY OF REDEMPTION. See **MORTGAGE.**

does not pass under a previous devise of the mortgage, 182.

release of, may be presumed from long possession, 182.

" ESTATE," meaning of the word, 60, 80, 81, 83.

this word does not imply a charge, 242.

devolution of equitable, 20.

for years vests in executor, 21.

par autre vie vests in executor, when, 21.

ESTATE *par autre vie.* See **TENANT PAR AUTRE VIE.****ESTATE TAIL**, nature of, 108 *et seq.*

no merger of, 113.

danger of barring by fine, 113.

may mean a special entail, 113.

often arises from implication, *Ib.*

presumption in favor of, 121.

how rebutted, *Ib.*

is sometimes a more valuable interest than an estate in fee, 121.

supports remainder, 121.

none in personalty, 122.

as determined by the phrase "dying without issue, 118
et seq., 122.

followed by an estate for life, 122.

difficult instances of construing, 122, 123.

by implication, 167.

See **TENANT IN TAIL.**

ESTOPPEL, corresponds to election under a will, 249.**EVENT** never controls construction, 338, 383.**EXCEPTION** giving rise to an implication, 171.

operating as an execution of a power, *Ib.*

in a will is construed as a grant, 64.

effect of, 73.

of part of a fee gives a fee in excepted part, 171.

EXCLUSION of one is the inclusion of another, 25.

EXECUTION. See **POWER**.

EXECUTORS, to A. for life remainder, to B. or his executors, B. takes the whole interest, 305.

to "A. or his representatives," after a life estate, 305.

means next of kin, when "share and share alike" is added, 305.

equivalent to heirs taking by substitution, 305.

"assign," when following "executors," is always a word of limitation, 307.

powers of sale by, 209, 210.

rights of, to securities taken upon the sale of land, 164.

power of, to sell land, 241.

direction to pay debts, 240.

does not charge land in the United States, 240.

takes only a power, and not an estate, under a direction to pay debts, 179.

takes no estate under a mere power to divide, 184.

aliter, under a power to manage, *Id.*

estate taken by, under a direction to pay debts, 179.

appointed by implication, 172.

when a legatee, 307.

must be an acting executor, to take legacy, 187, 307.

effect of legatee being also, 63.

to pay rents and profits to devisee, 187.

takes legal estate, 187.

of debtor, is a trustee of his debt, 187.

rights and duties of substituted, 187.

discretion given to, cannot supersede litigation, 52.

EXECUTORY DEVISE, distinguished from a remainder, 112.

EXECUTORY INTERESTS, donees under, are constituted by the court tenants in common, 228, 229.

definition of, 135, 141.

distinguished from remainders, 138, 139, 141.

are exactly the same as uses, 142.

of chattels, 142.

where these are consumable by use, 142.

cannot be defeated, *Id.*

hence arises their great superiority to remainders, 143.

are sometimes of the nature of conditions subsequent, 143.

are expounded by construction, and not by events, 143.

EXECUTORY INTERESTS—*Continued.*

limited on alternative contingencies, 143.

why subject to the rule against perpetuities, 115, 144.

Kent's opinion on this point examined, 115.

are not so subject as a trust executed to rule in Shelley's case, 136.

nor to the presumption in favor of a joint tenancy, 136.

there may be several executory interests in chattels alternative to a limitation in tail, 153.

relations of, to particular estates, 415.

EXECUTORY TRUSTS, how far subject to rule in Shelley's case, 98, 99 *et seq.*

EXECUTRIX, testamentary capacity of, 14.

EXONERATION, what necessary to exonerate personalty from liability to debts, 235, 239.

order of funds liable to exonerate land from mortgage, 234.

construction of the English exoneration statute, 235, 236.

in the United States, 237.

of personalty, 33.

in favor of a particular person, 240.

devisee of mortgaged estate entitled to, 231 *et seq.*

this presumption how rebutted, 232.

may be by implication, 241.

EXPERTS, evidence of, as to foreign laws, 12.

EXPRESSIONS of endearment are not of much avail for construction, 161.

EXPUNGING words, 62.

when allowed, 39.

EXTRA DIVIDENDS. See **DIVIDENDS**.

on testamentary gifts, 340.

F.

FACTS, foreign laws are proved as, 12.

"**FAILURE OF ISSUE**," limitations dependant upon, 114.

are not too remote after an estate tail, 114.

unless they are executory, and not remainders, 115.

reason of this distinction, 115.

FAILURE OF TRUSTS leads to resulting trusts, 161.

FALSE AFFIRMATION by beneficiary may not affect gift to him, 56.

FALSE DEMONSTRATION, is innocuous, when, 42 *et seq.*

"FAMILY," meaning of the word, 46, 313-4.

means children in bequests, 317.

means heirs in devises, 317.

meaning of, is often determined by the context, 317, 318.

FARM, meaning of the word, 65, 66.

FEDERAL LAW, its elements, 2.

relations of, to the common law, 2.

FEE. See **DEVISE, LAND, REALTY, WILL, "CONSTRUCTION."**

passes under a devise for a permanent purpose, 83.

passes by what words, 61, 62, 81, 82.

passes by a charge of debts, when, 81.

or by the word residue, *Ib.*

or by a devise of the rents of the estate, 81.

passes when, 75 *et seq.*

when taken by trustees, 174 *et seq.*

when not cut down to an entail, 168.

FEE SIMPLE. See **TENANT IN FEE SIMPLE.**

FEE TAIL. See **TENANT IN TAIL.**

principles for distinguishing fee tail from fee simple, 88.

FEUDAL SYSTEM, theory of, as to rights to land, 231.

FINE, effect of, 113.

FORECLOSURE, devise of equity of redemption acquired by, 182.

FOREIGN LAWS, are proved as facts to the court, 12.

presumption as to the substance, and provisions of, 12.

FORFEITURE, for felony, 16.

law of, varies in the different states, 16.

"FORTUNE," meaning of the word, 69.

FRAUD. See **UNDUE INFLUENCE.**

is not directly connected with construction, 54.

definition of, *Ib.*

undue influence is a species of, 54, 55 *et seq.*

its indirect relations to construction, 13.

parol evidence is always admissible in questions of, 187.

statute of, has been adopted in most of the States, 2.

FREEHOLD. See **FEE SIMPLE, REALTY.**

FUND, a sole fund for payment of debts, 243.

G.

GENERAL DEVISE. See DEVISE.

in the different States, 75, 76.

effect of, by statute, 31.

does not pass money secured by mortgage, 61.

does not raise a case of election, 250.

GENERAL INTENTION, is considered, in order to discriminate void from valid parts of will, 33.

GENERAL LEGACIES, are more favored than specific ones, 28.

GENERAL WORDS, their nature explained, 63, 349.

"GOODS," meaning of the word, 67.

worldly goods, 67.

at a particular place, 67, 68.

other goods, 68.

GOODS AND CHATTELS. See PERSONALTY.

meaning of the phrase, 68.

GOODS AND MOVEABLES, meaning of the phrase, 71.

GUARDIAN, in New York, 344.

H.

HABENDUM, in a deed may qualify premises, 110.

"HEIR," means statutory heir, 297.

the meaning of "heir" is not open to parol evidence, 297.

when the limitation is a contingent remainder, 297.

"and to her heirs" held to be substitutional, 297.

the substitutional sense of the word heir is more likely to be adopted in some States than in others, 298.

does not mean devisee, 298.

takes by descent rather than by devise, when, 298.

sometimes means "next of kin," 298.

especially in America, 299.

"heir female" may take only an estate for life, 299.

"to A. and his heirs male" in a deed, 299.

in a will confers an estate tail, 299.

distinction between an heir male or female by descent and one by purchase, 299.

Sir Ed. Coke's opinion overruled, 300.

meaning of the term in Maine, 303.

where there is a peculiar local law of descent, 303.

where the gift is substitutionary, 303.

“HEIR”—*Continued.*

where the fund is mixed, 303.

applied differently to realty and personalty, 303.

such a construction is bold, where no rule of tenure
is in question, 303-4.

heir-at-law in a bequest means “next of kin,” 304.

may take a legacy and after-acquired lands, 304.

in Pennsylvania, 304.

in Maryland, *Id.*

in New Jersey, *Id.*

“to the right heirs of the name of” A. None can claim
but one who is both heir general and also
of the name of A., 300.

“right heir” in a deed means heir, 300.

takes a contingent remainder in New York, when, 301.

rule in Archer’s case, 301.

various limitations to, 302.

in connexion with personalty sometimes means children, 303.
in America, 303.

is a purchaser in New York, 102.

denotes a substitutional gift, when, 424.

where there is a sale, 106.

why said to be favored in law, 26, 27, 231, 233.

can only be disinherited by plain words, 77.

a foreigner, put to his election, 250.

under a devise, still takes by descent, 77.

in a devise to trustees may be rendered inoperative by the
context, 180.

bound only by specialty debts at common law, 237.

favored more in some instances in the United States than
even in England, 240.

in cases of charitable uses, 162.

rights of, excluded only by strong implication, 162.

resulting trust to 160 *et seq.*

takes realty as a chattel, when, 161, 164.

may mean issue, 110.

HEIRLOOM, executor not allowed to sell, except to pay debts, 341.

“HEIRS AND ASSIGNS,” does not necessarily pass the absolute
interest, 88.

“HEIRS OF THE BODY,” sometimes words of purchase, 104.

HEREDITAMENT, meaning of the word, 60.

HOUSE, meaning of the word, 64, 65.

means heirs, 318.

HOUSEHOLD EFFECTS, meaning of the phrase, 69.

HUSBAND AND WIFE, joint will by, 5.

gift to, and to a third party, 287.

as tenants by entireties, 93.

I.

IDENTITY, requiring proof of, does not affect vesting, 263.

ILLEGALITY, to be proved by parol, must be part of the *res gestæ*, 186.

ILLEGAL TRUSTS, not presumed, 156.

ILLEGITIMATE CHILDREN. See CHILDREN.

never take, if legitimate children could have been intended, 315.

take, when, 315.

cannot take under a general description, 316.

never can claim along with legitimate children, unless the context is to that effect, 316.

cannot take if there is a question of paternity involved, 317.

ILLUSORY APPOINTMENT, now illegal in England, 229.

but not in America, 230.

IMMEDIATE GIFT, what is an, 290.

IMMORAL GIFTS explained, 414.

examples of, 415 *et seq.*

IMPERATIVE, what is an imperative direction, 221.

IMPLICATION, explanation of, 149, 166 *et seq.*

not open to parol evidence, when, *Ib.*

must be very strong, 166.

with respect to precatory powers, 166.

precluded by an express gift, 167.

of disinheritance, 167.

from gifts to strangers or to one of several co-heirs, 167, 168.

from gifts to testator's heir, 167, 168.

of an estate tail, 167.

of estates to issue, 168.

after an estate for life, 168.

rebutted by a residuary devise, 168.

of a life interest, 170.

in case of personalty, *Ib.*

of cross remanders may be between several and even between classes, 145, 146.

is unknown in deeds, 149.

IMPLICATION—*Continued.*

- sed qu.* as to life estates, even of freehold, 150.
- arises on a gift to the survivor of a class of donees, 150.
- is a doctrine not of tenure but of construction, 171.
- arising from an exception, 171.
- executor may be appointed by, 172.
- of powers, 172.
- may arise from an erroneous reference, 30.
- will not control an express limitation, 32.
- of an intention to exonerate personalty, 241.
- of a fee, 124.
- of a fee tail, precluded, when, 125.
- allowed, when, 126, 128.
- estates by, 302.
- applies to personalty as well as realty, 170, 302.
- of cross remainders, 144 *et seq.*
- under a trust power, 206, 226 *et seq.*
 - when rebutted, 226, 227.
 - when not rebutted, *Ib.*

IMPLIED GIFT, extent of, 224, 226.

INCIDENTS of estates, what are, 266.

are rules of law, 266.

but, the preliminary question under wills is one of construction, 266.

INCLUSION of one is the exclusion of another, 41.

this maxim not always acted upon, 41.

INCOME, when alone recoverable, 344.

for maintenance at discretion of trustee, 222.

undisposed of, under limitation to survivor, 168.

when carried by contingent residuary bequest, 347.

INCORPOREAL RIGHTS, grant of, by tenant in tail is void, 109.

INCUMBRANCE. See CHARGE, MORTGAGE, REGISTRATION.

INDEFINITENESS. See UNCERTAINTY.

INDESTRUCTIBILITY of a contingent remainder may not have been contemplated by testator, 181.

INFANT, land of, sold by court, becomes personalty, 164.

damages paid to, for highway, are personalty, *Ib.*

court elects for, 252.

INHERITANCE. See HEIR, FEE, DEVISE, IMPLICATION, LAND.

words of, in a will, 110.

INJUNCTION on behalf of prior equitable owner, 185.

INSTRUCTIONS to scrivener, cannot be proved by parol evidence, 57.

INTENTION yields to precedent, 23.

but controls all rules of construction, 28.

though not of law, 29.

controls reference of adjective, 28.

legal, not actual, binds, 29.

to be inferred from the will only, and the proper parol evidence, 30, 31.

may prevent last clause from controlling previous ones, 30.

must conform to the rules of public policy, 29.

applied to separate sound from unsound parts of will, 33.

in a conflict of inconsistent intentions general intention always prevails, 33, 34, 36, 39, 40,

may be directly proved, when, 49.

INTEREST, from what time recoverable on a legacy, 343.

on specific bequests for infants, 342, 343.

on conditional legacies, when, 344.

on annuity, 344.

tenant for life of, 345.

though subjected to a charge, does not prevent vesting, 263.

aliter, if contingent on the discretion of a trustee, unless there is a trust for accumulation, 264.

right of infant to, 342.

INTEREST AND DIVIDENDS, meaning of the phrase, 72.

INTRODUCTORY CLAUSE is a good key to testator's intention 30.

but will not pass a fee, 30.

INVENTORY required from tenant for life, 340.

"ISSUE." See **"DYING WITHOUT ISSUE."**

is very different from "such issue," 126.

synonymous with "descendants," 307.

a word of limitation in wills, 294, 307.

when ancestor takes a freehold, 307.

but is not so readily thus construed in bequests, 308.

in New York, 307.

estates to, by implication, 169.

Jarman's opinion on this point examined, 169.

as purchasers, 130.

distinctions between "issue" and "heirs of the body," 308.

"to A. and his issue living at his death," gives A. an estate tail, *sed qu.*, 308.

take as joint tenants, 324.

if tenants in common, take *per capita*, 324.

J.

JOINT BENEFICIARIES under antagonistic clauses, 40.

JOINT TENANCY, incidents of, 131, 132 *et seq.*

a joint tenant can both enfeoff and release, 132.

this power was important, *Ib.*

can sever the jointure, 132.

is more readily presumed as to realty than as to personalty,
133.

presumption of, how rebutted, 133, 136.

none between husband and wife, *Ib.*

to what the presumption in favor of a joint tenancy extends,
134, 135.

in case of lapse or void gift of part, 137.

how severed, 137.

how regarded in the United States, 137.

principle of the right of accruer, or *jus accrescendi*, 131.

is presumed in every possible case, 131.

its peculiar incidents, *Ib.*

is very convenient in trust estates, *Ib.*

in tail, when impossible, 93.

exceptions to the rule presuming, 133.

JOINT TENANT, presumption in favor of a joint tenancy, 200.

will by, 21.

under a will or by way of use need not have a unity of
time with the other joint tenants, 132.

of a class, 132.

of realty, 133.

JOINTURE, power to, ranks first if there are several powers in the
same will or deed, 208.

JURISDICTION of statutory courts, 9.

of courts of domicile, 10.

L.

LAND, meaning of the word, 60, 61.

meaning of the word in America, 63.

in Massachusetts, *Ib.*

contracted to be bought, 63.

to be sold, 63.

not devisable at common law, 35.

may pass here under "appurtenances," 64, 65.

aliter, in England, 65.

used in partnership is personalty, 396-7.

LAND—*Continued.*

rights of alien to, 399.

sold, becomes personalty, 164.

directed to be sold, becomes personalty, 156.

unless the sale is to be with consent, 156.

LAPSE, definition of, 41 *et seq.*

though expressly negatived by testator, when, 317.

none in the case of the death of some of several joint tenants, 417.

aliter, if the tenancy is in common, 417.

in the case of a class, 418.

is sometimes used to denote any kind of failure in America, 424.

aliter in England, 424.

where the phrase "now living" is used, 424.

prevented by limitation to survivor, 202.

question of, under limitation to next of kin of married women, 204, 205.

question of, where there is a gift to survivors, 195-6.

the courts do not strain against construing a gift according to the usual rules, even though this leads to a lapse, 425.

of estate "to A. or his executors," 305.

accelerates estates, 258.

its effect on exoneration, 240.

of legal estate, unimportant, 173.

may befall the equitable or the legal interest only, 418.

does not affect charge on the interest lapsed, 418.

lapse of a charge enures for benefit of devisee, 419.

or heir, *Ib.*

lapse and void devises fall to the residuary devisee, in what States, 419.

no lapse, if beneficiary leave issue, in what States, 420.

where legatee's death is already known to testator, 421.

is the same as invalidity, as regards the residuary devisee, 422.

enures, in most States, for the benefit of testator's heir, 422.

testator is not presumed to provide for, 423.

of a legacy to a debtor, 423.

when none, 423.

none, of a provision for creditors, 423.

presumption of, in France, 423.

is provable by parol evidence, 58.

LAPSED DEVISES, when comprised in a residuary devise, 346-7.

LAST CLAUSE, prevails, if several inconsistent ones, 30.

LAWS, if foreign, are proved as facts to the court, 12.

LEASE. See TERM FOR YEARS, PERSONALTY, 178.

power to, inconsistent with dower, 247.

LEASEHOLD, will pass as "land," when, 61.

may pass under a general devise, 63.

how affected by domiciliary laws, 11.

"LEAVING." See LEAVING ISSUE.

LEAVING ISSUE. See DYING WITHOUT ISSUE.

as to limitations of personalty, 119.

points to failure of issue at death of propositus, as to personalty, 119, 124.

LEGACY, defined and explained, 328.

includes all personal charges, 328.

controlled by context, 328-9.

real or personal, 329.

not recoverable at common law, 329.

unless it is specific and the executors have assented thereto, 329.

these rules much altered by statute, 329.

if in trust, must be administered by a court of equitable jurisdiction, 329.

is either general, demonstrative, or specific, 330.

these kinds explained and distinguished, 330 *et seq.*

a demonstrative legacy is the best kind of gift, 331.

a specific legacy is usually prefixed with the word "my" or "the," 332.

a legacy of money may be specific, 332.

courts lean against construing a legacy as specific, 333.

examples of specific legacies, 334.

annuity charged only on land is specific, 334-5.

of stock in general, 333 *et seq.*

security for future, 339, 342.

of chattels consumable by use, 342.

abatement of, on a deficiency of assets, 342.

payment of, not until after a twelvemonth from testator's death, 343.

if subject to a condition precedent, 343.

if charged on law, does not vest until it is payable, 259.

unless the postponement is for the convenience of the estate, 259.

payable out of realty and personalty, is partly real and partly personal in its incidents, 259.

LEGACY—*Continued.*

assets not marshalled for legatee, when, 260.

to one when he attains age, is vested, 260.

to be raised at a certain date, is vested, 260.

if charged on land, is construed as a disposition of realty, 260.

yet, if payable out of the proceeds of a sale, is vested, 260-1.

• when cumulative, 350 *et seq.*

where there is a repetition of several gifts, 351.

specific legacies cannot be cumulative, 352.

summary of rule respecting cumulative legacies, 352.

courts incline against accumulation, 352.

parol evidence respecting accumulation of legacies, 352.

personalty is primarily liable for legacies, even when charged on land, 242.

do not charge land, 238.

what charges a legacy on land, 241.

on specific devises, 241.

when charged along with debts, 241.

adeemed or satisfied, how affected by republication of will by codicil, 5.

election against, by next of kin, 251.

a doubtful charge is construed against the legatee, 238.

forfeiture of, 268.

threat of forfeiture of, is sometimes merely *in terrorem*, 268.

"to A. at twenty-one," is not vested until then, 261.

but "for A. to be paid to him at twenty-one," is vested at once, 261.

when recoverable by assumpsit, 242.

when demonstrative, 244.

when in its nature real, 244.

LEGAL AGE, how computed, 13.

LEGAL ESTATE, passes under a general devise, 187.

executors take, when, 187.

is of no value as to title, in States or districts having registries of titles, 185.

its only use, 185.

presumed to be surrendered, when long outstanding, 186.

test of, as regards trustees, 164, 176.

distinction between paying rents and permitting another to receive them, 175.

"LEGAL REPRESENTATIVES" means next of kin, 306.

sometimes means children, 312.

"next legal representative" does not mean executor or administrator, 306.

LIFE. See TENANT FOR LIFE, ESTATE.

LIMITATION, words of, in respect to the rule in Shelley's case, 102 *et seq.*, 309.

LOT, meaning of the word, 66.

LOUISIANA is still bound by its old common law, 2.

M.

MAINE, estate taken by trustees in, 181-2.

meaning of the term heir, in Maine, 303.

MAINTENANCE, trust for, does not authorize a sale, 211.

"MALE DESCENDANT," title of, 300.

MANORS must be as old as the statute *Quia emptores*, 17 Ed. I, 267.

MANUSCRIPTS, will not pass under "books," 73.

MARRIAGE revokes will of *feme sole*, 7.

its effects as a revocation, in Virginia, 7.

MARRIAGE ARTICLES explained with respect to the rule in Shelley's case, 100.

MARSHALLING. See ASSETS.

of assets, explained, 356 *et seq.*

not enforced in certain cases, 360.

where there is a charge of debts, 243.

is not allowed for charitable uses, 398.

MASSACHUSETTS, construction in, 162.

constitution of, adopted the common law, 1.

wills in, speak from date, 17.

devise of wild land in, 75, 76.

peculiar rules of, as to devises, 77.

rights of widow in, 245.

charitable uses in, 402.

MAXIM, when the equities are equal the law will prevail, 185.

hence, the importance of the legal estate in non-register districts, 185.

MEANING. See WORDS.

MERGER, origin of the doctrine, 131.

results of, are incurable at law, 235.

MICHIGAN, perpetuities in, 385.

"MILL," meaning of the word, 66.

MISDESCRIPTION, when inoperative, 42 *et seq.*

See "DESCRIPTION," "UNCERTAINTY," "DEMONSTRATION,"
"PAROL EVIDENCE."

MISNOMER is usually innocuous, 43 *et seq.*

MISTAKE as to character of beneficiary, 56.

if patent, is rectified, 56.

if latent, is not rectified, 57.

when remediable by parol evidence, 57.

MOMENTARY SEISIN. See SEISIN.

MONEY, meaning of the word, 69, 70, 71.

MORTGAGE is a chattel, and will not pass under a general devise,
unless the will is otherwise so far inop-
erative, 182.

money secured by, does not pass under a general devise, 61.
rights of a particular devisee of, 187.

beneficial interest in, will pass, under a gift of debts and
securities for money, 71.

but not under a specific or general devise of land,
182-3.

unless the testator is in possession, or
puts the land in settlement, 183.

passes under personalty, 71.

legal estate in, does not pass under "securities for money,"
71.

what passes under, 71 *et seq.*

rights of devisee of, in the United States are not the same as
as in England, 232, 237.

devise of land "subject to," 232.

in America, *Ib.*

when not contracted by testator, but had by descent, 233.

what acts amount to an adoption of, 233.

order of marshalling, or of exoneration, 234.

when it belongs to owner of land, it is presumed to be ex-
tinguished, 235.

this presumption rebutted—when, 235.

construction of the exoneration statute in England, 235.

exoneration in the United States, 237.

MORTGAGOR, when also Mortgagee, 235.

See MORTGAGE.

MORTMAIN, alienation in, explained, 392 *et seq.*

how affected by the law of charitable uses, 392
et seq.

N.

NAME, meaning of, 321.

assumption of, by license, 321.

mistake in 43, 45 *et seq.*

by repute is a sufficient designation, 46.

may be ascertained by parol evidence. In what cases, 47.

NATURALIZATION, effect of, 399, 400.

"NEAR" relatives, 321.

NEPHEW, includes such relatives by affinity, 310.

NET INCOME, example of, 172.

See INCOME.

NET PROFITS are equivalent to the land, 89.

"NET RENTS." See RENTS.

different from "rents" in its effect on the legal estate, 175.

NEW YORK, constitution of, adopted the common law, 1.

revocation of will in, 6, 8, 9.

legal age in, 13.

testamentary power in, 19, 76, 85.

executory devises in, 87.

rule in Shelley's case has been abrogated in, 102.

remainders in, 138.

charitable uses in, 406.

perpetuities in, 385.

NEXT prefixed to representative, 306.

NEXT OF KIN, meaning of the phrase, 319 *et seq.*

take as joint tenants, 319.

but next of kin under the statute take as tenants in
common, 319.

rule in *Spink v. Lewis*, 319.

rule in *Gundry v. Pinniger*, 319.

more favored than heir as to vesting of gifts, 257.

are as favored in America as the heir, as regards all rules of
construction, 232.

not barred by mere words of negation, 252.

preferred to strangers in a doubtful case, 34.

of married women, bequest to, 205.

of the male line denote relatives on the father's side, 320.

resulting trust to, 160 *et seq.*

take *per stirpes*, 326.

NON-VESTING CLAUSE, its use, in settlements of personalty,
151, 152.

NOTICE of contents of will is presumed on the part of the testator, 54.
 of a charge affects registration by the person getting
 notice, 185.

NOVATION of a debt, 233.

"NOW," "now living," construction of, 18.

O.

OBJECT, uncertainty of, 45 *et seq.*

instances of, 45.

OCCUPANCY, a reference to, is mere description, 65.

request concerning a tenant's, 223.

"OCCUPY," meaning of the word, 65.

OMISSION in will, effect of, 57.

distinguished from implication, 40.

OR, read "and," 38.

may indicate a substitutional gift, 425.

ORDER of funds liable to exonerate land subject to a mortgage, 234.

"OTHER" sometimes synonymous with "survivor," 193, 196.

a strange decision concerning, 312.

"OTHER GOODS," meaning of the phrase, 68.

P.

PARENT, when donee of a power, 227.

PAROL EVIDENCE. See INDEX TO PART I, *passim*.

is more freely admitted here than in England, 3, 21, 50.

is sought latterly to be excluded by construction, 53.

as to the *res gestæ* of a will, 4.

is not admissible to rebut the presumption of a revocation
 of a will, when, 6.

of domicile, 12.

inadmissible as to the date whence the will speaks, 18.

is admitted in most cases of uncertain description, 47, 53.

is admissible to induce an operation of the rule in Wild's
 case, 50.

is not admitted now as freely as formerly, 50.

yet certain abstract phases are not held void now as former-
 ly, 48, 49.

when not received, 50, 51.

of intent, 50.

American rules, as to, 51, 53.

semble, rules of, not altered by Wills acts, 51.

PAROL EVIDENCE—*Continued.*

not admissible to rectify mistake of fact, but only of description, 57.

not admissible to prove directions to scrivener, 57.

may show that a clause has been improperly inserted, 58.

but not that a clause has been omitted, 58.

admissible to explain the meaning of the word "farm," 66.

not admissible in questions of resulting trust, 160, 165.

principle of this rule, *Ib.*

not admissible in questions of implication, when, 166.

reason of this rule, *Ib.*

cannot be given of the meaning of the word "heir," 297.

nor that a legacy was intended to be substitutional, 352.

test for the applicability of, 374.

admissible to prove a secret illegal trust, 186.

or any fraud, 187.

as to whether a legacy is charged on land, 238.

to raise a case of election, *sed qu.*, 248, 250.

PARTNERS, gift to, 45.

are not presumed to be joint tenants, 133.

PATERNITY, any question of, invalidates bequest, 317.

PAYABLE, importance of the word in questions of vesting, 262.

PENNSYLVANIA, testamentary power in, 78.

charitable uses in, 402.

survivorship in, 194.

PER CAPITA, taking, explained, 324 *et seq.*

a mistake of Toller and Williams, corrected by V. C. Wickens, 326.

issue take, when, 324.

a class taking, in default of appointment, 226.

"PERPETUAL," meaning of the word, 85, 86.

PERPETUITY, none at common law, according to Lord St. Leonards, *sed qu.*, 375, 376.

contra, Fearne, Preston, and Jarman, 377.

the question stated, 377.

powers of sale or exchange not open to, 378, 382.

rarely occurs in a gift to testator's issue, 380, 381.

Jarman's argument respecting the possible remoteness of remainders, 379.

applies to the vesting not the possession of estates, 383.

often cured by a *sy pres* construction, 378, 383.

See REMOTENESS, EXECUTORY INTEREST.

PERPETUITY—*Continued.*

instances of, 115.

as to income, 386 *et seq.*

in New York, 385, 388.

in Michigan, 385.

rule against, applies to executory interests only, 144.

PERSONAL covenant not a real charge, 234.

“personal representatives” sometimes means “next of kin,”
306.

property, 59, 60.

See PERSONALTY, REALTY.

PERSONALTY, what is, 69.

wills of, were expounded by the ecclesiastical courts, 35.

are more liberally interpreted, perhaps, than de-
vises, *Ib.*

bequest of, is not an execution of a general power, 52.

what is, determined by context, 59, 60.

is subject to the rule in Shelley's case, 94.

limitations of personalty are sometimes construed different-
ly from those of land, 94, 119.

is subject to rule in Wild's case, 101.

estate tail in, gives the whole interest, 101, 151.

as to the phrase “dying without issue,” 118 *et seq.*

limitation of, to the survivor “in default of issue, 129.

not so readily deemed, as realty, to be owned in joint tenancy,
133, 134.

settlements of, 151 *et seq.*

not subject to the *cy pres* rule, 151, 152.

cannot devolve as an heirloom, 152.

and land contribute jointly, when, 356.

primary fund for payment of debts, 231, 355.

when the secondary fund, 231, 232 *et seq.*, 244.

specifically bequeathed, 233.

when mortgage descended on testator, 233.

in respect to, pecuniary legacies, 233.

by direct contract, 233, 234.

by clause in will, 234 *et seq.*

what context necessary for this purpose,
235.

when the realty is directed to be sold to pay
debts and the residue is to “be added to
the testator's personal estate,” 239.

PERSONALTY, primary fund for payment of debts—*Continued.*

- when the land is charged and the whole personalty is specifically bequeathed, 240.
- may be exonerated from debts by implication, 241.
 - but not by doubtful words, 243.
- specific portion of a primary fund, 243.
- when not at all liable, 244.
- in case of election by foreign heir, 250.
- gift of; contingent where gift of realty would be vested, 259.
- land directed to be sold and terms of years are personalty, 259.
- alone passes, as a rule, under general personal terms, 63.
 - especially if the legatee is also executor, *Ib.*
- its relations to domiciliary law, 11.
- general bequest not an execution of a power, 208-9.
- exoneration of, 33.
- why less specific than land, 341.
- contingent limitation of, will not affect the estate taken by a trustee, 181.

securities for debt are in equity only chattels, 177.

PER STIRPES, next of kin claiming, 226.

PLANTATION, meaning of the word in Ohio, 82.

PLANTATIONS in the West Indies, a devise of, carries stock with it, 62.

PLEDGE of specific legacy, 341.

POLICY under "debts," 72.

POSSESSION at law belongs to him who has the legal estate, 185.
aliter in equity, 185.

qu, whether some of the registry acts do not give even the legal estate to the first registered owner or incumbrancer, 185.

POSSIBILITY, if coupled with an interest, is devisable, 19.

if bare, is not devisable in some States, 20.

upon a possibility, illegal, 145.

this doctrine examined, *Ib.*

POSTHUMOUS CHILD, rights of, 7, 360.

has the rights of a child, 311.

POSTPONEMENT of vesting, 265.

See VESTING.

of payment does not enlarge class of beneficiaries, 291.

POWER to appoint by will, 9.

See APPOINTMENT.

POWER—*Continued.*

three kinds of, 206.

suspension and extinguishment of, 206.

may be both appendant and collateral, *Id.*

peculiar legal value of, 206.

when in trust, cannot be suspended or extinguished, 207.

if discretionary, and fairly exercised, not interfered with by the court, 207, 217.

if general, is not a trust, 207.

may be reserved in deed of bargain and sale, or covenant to stand seized, 207, note.

but a general power cannot be reserved in a covenant to stand seized, *Id.*

aliter in a will, 207.

executed after covenant not to do so, 208.

the case of *Learned v. Tallmadge* appears to have been decided on sound principles, 208.

order of priority of various powers, 208.

when executed by a general devise, 208.

of married women, 13, 14, 208, 253.

not executed by a general bequest of personalty, 209.

Quæ? as to realty in those States where devises speak only from date of testator's death, 209.

to executors to sell does not convey any estate to them, 209.

of sale by implication, 210, 211.

of sale to several is well executed by the sole acting executor, 211.

if subject to conditions, these must be complied with, 211.

of sale attached to a life estate does not give a fee, 88.

to general devisee, of disposition generally, gives a fee, 88.

aliter, if he only takes a life estate, until he appoints to himself in fee, 88.

if discretionary and unexecuted, is totally inoperative, 216.

donee of, may take jointly with the objects of the power, 227.

of selection distinguished from power of distribution, 225-6.

exercisable by will only, 225.

executed by the court among a class, *per capita*, 226.

appointments under special, 175.

if in trust, or of selection, is rarely void for uncertainty, 45.

period for exercising, 158.

grant of a power precludes presumption of a fee or fee tail, 121.

- POWER OF SALE** not a perpetuity, 378, 382.
 implied in a direction to pay debts, 179.
- PREAMBLE**, effect of, 63.
- PRECATORY TRUST**, questions of, are rare under deeds, 211, 212.
 explained, 211 *et seq.*
 by implication distinguished from a trust power, 212, 228.
 rule of precatory trusts stated, 213.
 law of, is in a state of transition, 213.
 requires three elements of certainty, 213, 216.
 tendencies of the courts respecting, 216, 217.
 elucidates testamentary difficulties, 216.
 English law of, 219, 220.
 authorities relating to, 221.
 terms of request, 221 *et seq.*
 what expressions raise, 221.
 do not raise, 222, 224.
 as to definiteness of subject matter, 223.
 See **TRUST**.
- PRECEDENTS** are paramount to all supposed rules of law or construction, 23.
- "PREMISES,"** meaning of the word, 65.
- PRESUMPTION**, what kind of, is open to parol evidence, 160.
 that personality is primary fund for payment of debts, 231.
 how rebutted, 232.
 need not be strictly necessary, 163.
 but must be strong, *Ib.*
 favors next of kin as well as heir, *Ib.*
 as to when a will speaks, 17.
 that testator speaks with reference to the State of his personality at the time of his death, 330.
 respecting double legacies, 330 *et seq.*
 of ademption, 365.
 that testator foresees change in the law, 297.
 that a legal title is better than a contractual one, 298.
 that a testator did not mean to provide for lapse, 205.
 against revocation, 6.
 in favor of a joint tenancy, 131.
 vested and common law interests, 139, 141.
 of equity, as to double gifts, 34.
 conclusive as to the estate taken by trustees, 174.
- PRIMARY GIFT**, relations of, to ulterior limitations, 415.
- PRIMARY LIABILITY**, when created by statute, 236-7.

- PRINCIPAL, bequest of, does not carry interest, when, 71.
- PRINCIPLES OF PUBLIC POLICY cannot be controlled by testator, 32.
- PRIORITY of various powers, 208.
- PROBATE, is conclusive of the testamentary character of the document proved, 9.
 is not conclusive as to ultimate rights of the parties, 9.
 statutory courts of, in United States and England, 9.
 jurisdiction of, 9.
- PROCEEDS of sale, bequest of, 164.
 are personalty in the case of an absolute conversion, 164.
 part excepted from, belongs to heir or residuary devisee, 164.
- PRODUCE, a gift of produce is a gift of the fund itself, 91.
- PROMISSORY NOTES pass under "money," 70.
- "PROPERTY," meaning of the word, 61, 69.
- PUNCTUATION, how far a guide to the construction, 28.
 is no guide, if it is itself the source of difficulty, 29.
- PURCHASE, distinguished from descent, 299.
 estate by, is better than one by descent, 93.
 estates by, in America, 182.
 example of heir taking by, 176.
 words of, in Kentucky, 104.
- PURCHASER, liability of, for debts, 243.
 liable to look to the application of purchase money, if debts are specified, 237.
Aliter, if the charge is general, 237.
 the heir a purchaser in New York, 102.

Q.

- QUASI ENTAIL, what is a, 93.
 in personalty, 152.
 may be barred, how, 21, 109, 110.

R.

- READING of will to testator is not indispensable, 55.
- "READY MONEY," meaning of the phrase, 70.
- "REAL CHARGES," what are, 244, 342.
- REAL ESTATE. See REALTY, FEE SIMPLE.

"REALTY." See PERSONALTY.

is sometimes read "personalty," 59.

real and personal terms may be rendered convertible by context, 59.

passes under general words, 62.

principles for construing will of, 17, 35.

semble, is not placed to all intents on the same footing as personalty, as regards the statutes that make wills speak from testator's death, 51, 52.

appointed under a general devise, *Id.*

will of, 7, 9, 10.

probate of, 9.

by what court to be granted, 9.

how construed, 10.

its legal relations to domicile, 10, 11.

is subject to rule in Shelley's case and in Wild's case, 101.

settlements of, are construed differently from those of personalty, 119 *et seq.*

a joint tenancy is presumed in realty more readily than in personalty, 134.

exoneration of, in cases of mortgage, 231 *et seq.*

when administered *pari passu* with personalty in discharge of debts, 243.

sometimes the sole fund for payment of debts and real charges, 244.

in case of election by foreign heir, 250.

devise by married woman, 13, 14.

RECITAL in will is an estoppel, 249.

may pass as interest, 172.

even when false, 172.

RECOVERY is the means for changing an entail into a fee, 101.

effect of a, 113.

RE-ENTRY, conditions for, are very useful, 268.

REGISTRATION prevents tacking, and deprives the legal estate of all value, 185.

is notice to all the world, 185.

"RELATIONS" means next of kin according to the statute of distribution, 320.

but never includes husband, or wife, or relatives by affinity, 320.

RELATIONS—*Continued.*

meaning of the word further considered, 321, 322.

“near,” “deserving,” “poor,” 321.

a gift to “poor relations” is sometimes construed as a charitable use, 321.

* power of selecting, 322.

distributing amongst, 322.

relatives or connections, 323.

RELIGIOUS USES, what are, 411 *et seq.*

how far recognized by the Constitution, 411.

examples of, 410 *et seq.*

REMAINDER described, 138.

distinguished from an executory interest, 138, 139.

incidents of, in New York, 138.

is either vested or contingent, *Ib.*

examples of these, *Ib.*

presumption in favor of, 139.

law of, important even under wills, 139.

defect of, may be provided for, 139.

not bound by acts of particular tenant, 162.

when not accelerated, if preceding estate is void, *Ib.*

under a devise “to A. at twenty-one, and if he die under age, to B.” the heir takes until A. attains twenty-one, 162.

relations of, to particular estate, 162.

cannot be too remote, 115.

may have been intended by testator to be destructible, *sed qu.*, 181.

this question affects the estate taken by trustees, 181.

none after a vested entail of personalty, 151.

construed here as in England, 182.

of an annuity, 91.

when vested, 256.

See CROSS-REMAINDERS.

cross-remainders explained, 144.

cross-remainders may be implied between more than two, 144.

reasons for the contrary opinion, 145.

the implication of cross-remainders is not affected by any statutory meaning of the word “issue,” 144.

REMITTER, what is a, 109.

REMOTENESS. See PERPETUITY.

explained, 374 *et seq.*

of limitations after a general failure of issue, 168.

rule as to, stated, 118, 119 *et seq.*

See VOID GIFTS.

cannot affect remainders after an estate tail, 114.

RENEWABLE LEASES, likely to become general here, 21.

RENT, a devise of, is equivalent to a devise of land, 345.

power to pay gives legal estate, 175.

may be reserved on a grant in fee, 267.

RENT CHARGE, by a tenant in tail is void after his death, 108.

estate in, is, in equity, only a chattel, 177.

mortgages, rents charge, and other securities for money are
chattels in equity, 177.

"RENTS AND PROFITS," equivalent to land, 61, 88.

authorizes a sale, 89.

change in the law on this point, 89.

RENTS IN ARREAR, what are, 71.

REPRESENTATIONS, in Connecticut, 312.

in North Carolina, 312.

"REPRESENTATIVE." See LEGAL REPRESENTATIVE.

primary meaning of, is administrator, 306.

REPUBLICATION of will by codicil, 5.

under New York revised statutes, 9.

REPUGNANCY, in a deed, 118.

is differently construed from that in a will, 118.

of clauses, how sought to be remedied, 35 *et seq.*

REQUEST, what is a legal, 221.

RES GESTÆ, domicil is part of, 12.

provable by parol evidence, 186.

what is relevant evidence of, 186.

RESIDUARY BEQUEST, comprises lapsed and void bequests, 349.

given by what words, 349.

sometimes means only a particular legacy, 350.

RESIDUARY DEVISE, does not comprise lapsed or void devises,
346.

except by statute, 347.

rebutts implication, when, 169:

accompanied with a particular devise, 170.

not favored, 170.

distinguished from an implied life estate in personalty, 171.

RESIDUARY LEGATEE, must answer the description in will at
the time of testator's death, 290.

"RESIDUE" meaning of, 73, 74.

what passes under, *Ib.*

comprises lapsed and void bequests, *Ib.*

result of a failure of a portion of, 74.

qu.? as to America, *Ib.*

abatement of, 74.

of realty, 164.

will not pass by a general bequest of personalty,
when, *Ib.*

qu.? does this rule hold in America, *Ib.*

retains its original character, in cases of conversion for
special purposes, 164.

rights of devisee of, 164.

may pass defeasible fee, 87.

rights of tenant for life of, 152 *sed qu.*

of certain stocks is a general legacy, 339.

courts lean to the vesting of, 264.

"to be divided," 257.

"to be divided after youngest child attains age," 184.

RESULTING TRUST arises, when, 160 *et seq.*

question of, sometimes difficult, 160.

under a trust to pay debts, 166.

not open to parol evidence, *Ib.*

where declared trusts are inapplicable to all the property,
84, 161.

or are not co-extensive therewith, 161.

doctrine of, is the converse of implication, *Ib.*

arises, unless the construction is clear to the contrary, 161.

from a direction to convert, 157 *et seq.*

of realty, if there is a devise of such, but the trusts are in-
applicable, 84.

from a gift void for uncertainty, 227.

"REVERSION," meaning of the word, 61, 227.

devise of, expectant on estate tail, 125.

difficulty as to, *Ib.*

REVISED STATUTES of New York, 346.

do not apply to previous or foreign wills, 9.

republiation under, 9.

of Massachusetts, 346.

REVOCATION, partial, by codicil, 6.

implied, 6.

not caused by a contract to sell, 6.

REVOCATION—*Continued.*

by transfer, 6.

in Pennsylvania and Delaware, 6.

in Ohio, Indiana, Illinois, and Connecticut, 7.

under New York revised statutes, 6, 8.

in the other States, 7.

RIGHT HEIRS. See HEIR. INTRODUCTION TO PART I.

RULE of law, what is, 24.

distinguished from one of construction, 266.

RULE in Shelley's case, reason of, 93, 131.

discountenanced in America, 21.

States in which it prevails, 102.

has been abrogated, 102.

as to the words "son," "child," "family," 103, 104.

"to A. for life, and after his death to his children," the children take by purchase, 104, 105.

in England, 107.

has been sometimes indiscreetly substituted for a *cy pres* construction, 36.

is an exception to third class of remainders, 93.

summary thereof, *Ib.*

an estate by purchase is more valuable than one under the rule, 94.

has little operation in America, 93.

is only a rule of construction, not of law, 93.

applies to shares in certain companies, 94.

and to personalty, 94.

perverted in *Perrin v. Blake*, 95.

is still perverted in England, 96 *et seq.*

not in America, 96 *et seq.*

precluded by a superadded limitation to different heirs, 96.

not by a tenancy in common, 96.

Jarman's opinion as to, *qu.*? 97.

in deeds, 98.

applies to equitable estates, 98.

and partly to executory trusts, 98, 99.

under direction, "as counsel shall advise," 99.

is stronger in wills than in marriage articles, 99.

not controlled by words of distribution in settlements of personalty, 153.

sed qu. in the United States generally, 96 *et seq.*

does not apply, unless both particular estate and remainder are both legal or both equitable, 176.

S.

SAILORS' wills, how construed, 33.

SALE, power of, 209 *et seq.*

in New York, 211.

not a perpetuity, 378, 382.

implied in a direction to pay renewal fines, when, 238.

implied in a direction to pay debts, 179.

fund for payment of debts, 243.

SECONDARY sense of phrases, when only adopted, 245.

"SECURITIES for money," meaning of the phrase, 71, 72.

does not pass a legal estate, 187.

SECURITY by tenant for life, 340.

taken upon the sale of land is personalty and belongs to executor, 164.

SEISIN, when only a momentary seisin is taken by trustees, 176.

its relations to appointments, and rule in Shelley's case, 95.

SEPARATE USE. See TRUST FOR SEPARATE USE, 286:

will of property settled to, 14.

"SERVANTS," what are, 323.

comprises only domestics hired at a yearly stipend, 324.

SETTLEMENTS of personalty, 151 *et seq.*

how to be framed, *Ib.*

SHARE, when first share becomes payable, the whole fund must be distributed, 292.

unless the context is to the contrary, 292.

in certain companies are subject to rule in Shelley's case, 94.

See LEGACY, LAND, DEVISE.

"SHARES," will not comprise a policy of insurance, 72.

"SON" is a word of purchase, 307.

but is often construed as a word of limitation by force of the context, 307.

SPECIFICALLY, meaning of the word, 74.

See LEGACY.

SPECIFIC CHARGE lapses for benefit of heir, 347.

SPECIFIC DEVISE, all devises of land are specific, 345.

effect of recent legislation on this rule, 346.

may be residuary, 346.

followed by a change of interest, 346.

SPECIFIC DEVISEE taking only a partial interest, 347.

SPECIFIC LEGACY explained and illustrated, 331 *et seq.*

when alternative, 337.

not favored in construction, 333, 337.

points to date of will, 18.

SPECIFIC LEGACY, points to date of will—*Continued.*

hence arises the doctrine of ademption, 18.

conversion and ademption of, 18, 19, 340.

distinguished from a gift of "all personalty," 341.

STATES vary as to laws of testamentary capacity, 14.

STATUTE MERCHANT, estate by, 178.

STATUTES of England, if old, public, and general, obtain here, 1.

declaratory of common law, 3.

of most of the States require wills to be in writing, 3.

analogous to 1 Vict. c. xxvi, prevail in several States, 3.

what statute governs wills, 8.

of wills, 13, 17.

as to "dying without issue," 128, 129.

STIRPES. See **PER STIRPES.**

STOCKS may pass under "money," 69.

per stirpes explained, 324 *et seq.*

STRANGER postponed to next of kin in a doubtful case of construction, 34.

cannot take advantage of breach of a condition subsequent, 271.

"**SUBJECT TO DEBTS**," construction of, in England and the United States, 232.

SUBSTITUTIONAL GIFT to heir, 424.

indicated by the word "or," 425.

not necessarily contingent, 257.

legacies to children are construed in a peculiar way, 290.

"**SUCH ISSUE**," different in effect, from issue, 309–10.

explanation of, 126.

SUGGESTIONS to testamentary draftsmen, 426.

for assimilating law of personalty to that of realty, 67.

See **ISSUE**, "**DYING WITHOUT ISSUE**."

SUPPLYING WORDS, in what sense this is done, 40 *et seq.*

SUPREME COURT of the United States, its principles of adjudication, 23.

SURPLUS, meaning of the word, 218.

when held by trustee for his own use, 160.

belongs to the heir, when, 161.

"**SURVIVOR**," three leading questions respecting the legal effect of this word, 189 *et seq.*

Rule in *Ferguson v. Dunbar*, 189.

“SURVIVOR,” Rule in *Ferguson v. Dunbar*—*Continued.*

- its inconvenience, 191.
- is an exception to the rule that allows cross-remainders, 191.
- has been weakened by late decisions in England, 192.
- though not in America, *Id.*
- how affected by a collateral contingency, 192.
- Rule ought to be changed, 192.
- construed too technically, 191.
- is sometimes construed “other,” 193, 196.
- reason for this construction, *Id.*
- when used with reference to a class as a word of limitation, 194.
- in Pennsylvania, 194.
- gift to, does not carry accrued shares, 195.
- of a class, 195.
- rights of, to accrued shares, 196.
- period for ascertaining the survivor, 197 *et seq.*
- under a tenancy in common, 197.
- after an estate for life, 198.
- reason why the testator’s death was regarded as the period for computing survivorship, 198.
- survivorship may be computed in four different ways, 198.
- different results of these modes of computation, 199.
- under a bequest, as distinguished from a devise, 199, 200.
- where there is a substitutional bequest, 200.
- or a contingency, 200–2.
- limitation to, in order to prevent lapse, 201.
- of children, 202–3, 205.
- survivorship when shown to be indefinite, 203.
- results of the cases, 203.
- doctrines respecting survivorship likely in the future to be much discussed in America, 203.
- meaning of the term in New York, 204.
- when executor of a deceased legatee, 205.
- how survivorship is computed in America, 296.
- income undisposed of under limitation to, 168.
- what are children of a “surviving grandchild,” 170.
- a gift to the survivor of several persons does not necessarily give estates to all by implication, 171.

T.

TACKING, explanation of, 185.

TAIL, joint tenancy in, impossible, when, 93.

See TENANT IN TAIL.

TECHNICAL PHRASEOLOGY, construction of, 37.

is construed technically, if context is silent on the point, 24.

TENANCY BY ENTIRETIES, incidents of, 133.

TENANCY IN COMMON, by what words created, 136.

lapse or invalidity of a gift in common operates for the benefit of the heir, 137.

aliter in cases of joint tenancy, *Id.*

in equity, 133, 135.

held to be inconsistent with rule in Shelley's case in America, 95.

aliter in England, 96.

exists in equity among persons who contribute unequally to a joint undertaking, 134.

TENANT who has not attorned to assignee of reversion, 185.

TENANT FOR LIFE, of chattels, 142.

consumable by use, *Id.*

after an estate tail, 122.

of a specific legacy, 339.

rights and duties of, 339, 340.

TENANT IN COMMON cannot defeat an express right of survivorship, 197.

implied beneficiaries under a power of distribution, are tenants in common, 228.

gift to individuals as tenants in common lapses *pro tanto* on the death of a beneficiary, 229.

when is there not a lapse, 228.

See POWER, ILLUSORY APPOINTMENT.

TENANT IN FEE cannot be prevented from assigning, 29.

subject to an executory devise is still entitled to curtesy, &c., 143.

TENANT IN TAIL, words for creating, by will, 110.

cannot be prevented from disentailing and selling the land, 29.

sometimes mistaken for a tenant in fee simple, 112.

general nature of an estate tail, 108 *et seq.*

in America, 116, 117.

has no devising power, 108.

TENANT IN TAIL—*Continued.*

cannot encumber, 108.

how differs from tenant in fee, *Ib.*

may bar the entail by fine or recovery, 108.

distinctions between these two modes of conveyance, 108.

three classes of charges by—void, voidable, and indefeasible, 109.

by levying a fine confirms his previous incumbrances, 109.

settlements by, 109.

words for creating by deed, 109, 110.

other conditions for constituting, 109.

special or male, 110.

has unlimited power to commit waste, 110.

rights and duties of, 110, 117.

after possibility, &c., can never acquire fee by recovery, 101.

of personalty has the whole interest, *Ib.*

TENANT *par autre vie*, cannot create an entail, 109.

but only a *quasi* entail, *Ib.*

TENANTS BY ENTIRETIES, what are, 93.

TENEMENT, meaning of the word, 60.

does not pass a fee, 85.

TERM of years described, 177.

indefinite terms to trustees, 177.

all interests created out of terms of years are chattels also, 182.

vests primarily in the executor, 21.

TESTAMENTARY draftsmen, suggestions to, 426.

law of America and England, 3.

power of bankrupt, 120.

power in New York, 19, 76, 85.

TESTATOR presumed to know contents of will, 54, 55.

this presumption shifts if he was of weak mind, 54.

who has not read will, is still bound thereby, 55.

TIME means a reasonable period, when, 158.

TRANSFER, revocation by, 6.

TRANSPOSITION. See WORDS.

of words, 35.

when allowed, 37 *et seq.*

at law and in equity, 34.

TRUST. See TRUSTEE, RESULTING TRUST, FRAUD, EQUITY, CONSTRUCTION.

when satisfied, legal estate for, is valueless, 185-6.

trustee compelled to discharge trusts, 186.

an illegal secret trust may be proved by parol, 186.

unless it be subsequent to the making of the will,
186.

may be engrafted on will by parol, when, 9.

if bare, is not within the statute of descents of New Jersey,
304.

TRUSTEE takes legal estate, when, 174 *et seq.*, 177.

to pay rents, 175.

"to permit A. to receive rents," 175.

"to pay or permit," &c., 175.

taking legal estate only during the life of the particular
tenant, 176.

takes sometimes only a term during the minority of *cestui
que trust*, 176.

to preserve contingent remainders, holds the legal estate,
176, 179.

"unto and to the use of," 177.

test of extent of estate of trustees, 174, 177.

*takes only a term under a trust for debts, when, 177.

may take a fee under a general devise, 177.

takes a determinable fee, when, 177.

takes legal estate, when, 174 *et seq.*

takes only a momentary seisin, when, 176.

estate of, is affected by there being contingent remainders in
in the will, 181.

when the property is personal, *Id.*

estate taken by, under limited trusts, with powers of sale
or leasing, 179.

no fee taken by, when, 179.

the question of the estate taken by, under will, is construed
liberally, 179.

when empowered merely to convey the fee, 179.

estate taken by trustees to preserve contingent remain-
ders, 179.

for limited purposes, with power to appoint the fee, 180.

to appoint the fee, has an executory power, 180.

express fee of, reduced by context, 177.

devise of land to trustees and their heirs, with power of sale,
does not necessarily give them the fee, 180.

TRUSTEE—*Continued.*

estate of, in Maine, 181-2.

in the States generally, 182.

American law as to the estate taken by trustee, coincides with that of England, 182.

also as to uses and remainders, *Id.*

and nearly so as to limitations by way of purchase, *Id.*

law of, has been recently much altered in England, 184.

this legislation has led to decisions that are of use here, 185.

questions respecting the estate taken by trustee, are more important in England than here, 185.

not allowed to abuse his discretion, 186.

not deprived of a fair discretion, 186.

test of the estate taken by, 174.

semble, under special powers, takes, a power of curatorship, 175.

with a discretion to convert, 157.

discretion of, as to income for maintenance, 224.

discretion of, in cases of conversion, 158.

TRUSTEE TO PRESERVE CONTINGENT REMAINDERS,

use of this limitation, 139.

TRUST ESTATES should be in joint tenancy, 131.**TRUST FOR SEPARATE USE**, is usual in America, 286.

what words will create, 286.

not create, 286.

the appointment of a trustee for, is unnecessary, 287.

for a man is void, 287.

TRUST-POWER. See **POWER, TRUST.**

implies a gift in default of appointment, 129.

U.**UNCERTAINTY.** See **DESCRIPTION, MISDESCRIPTION, FALSE DEMONSTRATION, PAROL EVIDENCE.**

what is, 223.

in the late cases has been open to parol, in most instances, 44, 223, 225.

is usually powerless to defeat a gift by will, 43 *et seq.*, 369 *et seq.*

of description of subject or object, 43, 45 *et seq.*

sometimes leads to a failure of the gift, 44.

UNCERTAINTY—*Continued.*

- arising from misdescription, 371.
- examples of, 225, 372.
- of object, 373.
- when curable by parol, 374.
- resulting trust under cases of, 227.
- does not apply to objects of a charitable use, 228, 401.
- seeming, but not real, 370, 371.

UNDUE INFLUENCE. See **FRAUD.**

- by a stranger distinguished from that by a relative, 54.
- American rule as to, 54.
- clause void on account of undue influence may not affect rest of will, 55.
- aliter*, in certain cases, *Ib.*

USES. See **CHARITABLE USES, TRUSTEE, PERPETUITY.**

- what uses alone are executed by the statute, 414.
- their relations to devises, 173.
- what interests are not within the statute of, 175.
- construed in America as in England, 182.

UTENSILS, what pass as, 72.

V.

VENTRE SA MERE, 311. See **POSTHUMOUS CHILD.****VERMONT** has a statutory system of conveyance, 103.**VESTED INTEREST**, its incidents, 259.

- definition of a vested remainder, 254.
- sometimes means vested in possession, 254, 259.
- after failure of issue, 255.
- distinguished from contingent interests, 254, 255, 259.
- courts incline to hold interests vested, 256.
- an estate when not, 256.

VESTING, in civil law, different from ours, 261.

- is not suspended by the postponement of division until a future period, 262.
- of interests in land, 254 *et seq.*
- devise after payment of debts does not postpone, 256.
- of charges of portions, 258.
- does not prevent disclaimer, 259.
- of legacies charged on land, 259.
- general rule, 259.
- when postponed, *Ib.*
- if payment is dependent on a contingency, this renders the legacy contingent, 262.

VESTING—*Continued.*

indicated by a gift of interest meantime, 262.

“to A. ‘upon,’ ‘at,’ ‘when,’ or ‘if’ he attain age or marry,”
is contingent, 62.

the question in such cases is whether the gift and
time of payment are distinct, 262.

implied in accumulation, 263.

to A. “when the youngest child attains twenty-one,” post-
pones vesting until then, 263.

not affected by requiring proof of identity, 263.

may not be in legatee’s lifetime, 263.

not affected by a charge on gift, 263.

VOID CLAUSE does not necessarily invalidate remainder of will, 33.

VOID DEVISE, when comprised in a residuary devise, 346-7.

VOID GIFT, 369 *et seq.*

gifts are at present rarely void for uncertainty, 369.

effect of, on will, 33, 55.

principle of this rule, 55.

VOLUNTARY SOCIETY, what is a, 45.

W.

WIDOW, rights of, to personalty, 247.

rights of, how affected by a gift of personalty, 248.

in Illinois, 246.

in Massachusetts, 245.

presumed to elect in favor of will, 245.

WIFE, what is a, 323.

WILD’S CASE, rule in, 36.

is an exception to rule in Shelley’s case, 101.

prevails in America, 101.

is not applied to after-born children, if those living
at the time of the will shall die, 314.

WILL. See CONSTRUCTION, LEGACY, REALTY, PERSONALTY, POWER,
TRUST.

suggestions for drawing, 426 *et seq.*

must in most States be written, 3.

is governed in most States by statutes analogous to 1 Vict.
c. xxvi, 3.

defined and explained, 4.

distinguished from a deed, 4, 27.

may in some States consist of any document, such as a re-
ceipt for stock, note, bond, &c., 4.

WILL—*Continued.*

- need not be read to testator, 55.
- effect of, being numbered in sections, 41.
- parol evidence respecting the date and other *res gestæ* of, 4, 49, 58, 118.
- See INDEX TO PART I., *Passim.*
- made during the civil war, 16.
- of alien, 14, 16.
- gift to foreign corporation under a, 16.
- date by which it is construed, 16.
- now regulated by statute in most States, 16.
- speaks from testator's death, in what States, 17, 347.
- speaks from date, in what States, 17.
- effect of, in English law, has been varied by construction in some States, 17.
- what may be disposed of, by, 19.
- by joint tenant, 21.
- principles for construing will of land, 17, 35, 75 *et seq.*
- of land was not allowed at common law, 35.
- of land not owned by testator, 20.
- passes after acquired land, when, 21.
- may be construed partly as a deed, 27.
- intention of testator to be looked for more liberally than under a deed, 27.
- of sailor, 32.
- uncertainty in, 43 *et seq.*
 - governed by same law as uncertainty in deed, 47, 49.
- construction of, not controlled by accident, 52.
- of personalty is construed according to the civil law, 264.
- of realty according to the common law, 264-5.
- of personalty in New York, 259.
- last clause in, prevails, 39, 302.
- effect of void clause in, 33, 55.
- if revoked, cannot be afterwards read in aid of construction, 58.
- may be annulled, but not reformed, by parol evidence, 58.
- and codicil are one instrument within the meaning of the rule in Shelley's case, 94.
- how affected by the rule in Shelley's case, 92 *et seq.*
- is construed as a use, 135.
- proof and record of, in New York, 259.

WILL—*Continued.*

- by husband and wife, 5.
- republication of, by codicil, 5.
 - effect of, on legacies, adeemed or satisfied, 5.
- revocation of, by *feme sole*, 7.
- revocation of, under New York revised statutes, 6, 8.
- revocation of, in the various States, 6, 7, 8.
- in respect to a conflict of laws, 8.
- containing gift to witness, 400.
 - State laws, respecting, 400.

WITHOUT ANTICIPATION. This clause in the case of a male
is void, 287.

in the case of a female is valid, 286-7.

WITNESS, effect of gift to, on will, 400.
devise to, 15.

- or to husband, wife, or child of, 16.
 - its relations to validity of will, 15.
- competency of, how affected by ademption, 15.

WORDS, general effect of, 63.

- are to be understood in their primary sense, as a rule, 28.
- when only is a secondary sense allowable, PART I, 103, 106.
- primary meaning of, is-always controlled by context, 59.
- are taken strongly against the grantor in a will as in a deed,
26.

- alteration of, 38 *et seq.*
- supplied by construction, 40 *et seq.*, 171.
 - but sparingly, 41.

- ♦ transposition of, 26, 34, 35, 37 *et seq.*
- when not allowed, 35.

See UNCERTAINTY, VOID GIFT, TRANSPOSITION, PAROL
EVIDENCE.

- what is necessary for transposition of, 37.
- expunging, 36, 37, 39 *et seq.*
- if technical, are construed technically, 36.
- mistakes in use of 37.
- of uncertain signification, 45 *et seq.*

Y.

YOUNGER CHILD, what is a, 25, 313.
becoming elder, 313.
rights of, 341.

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